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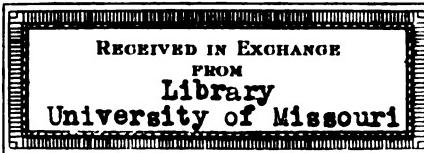
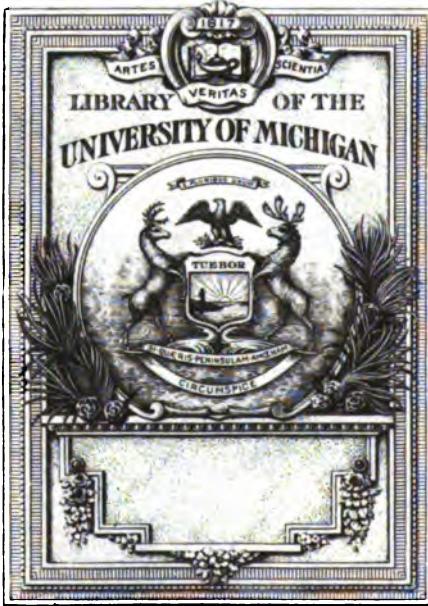
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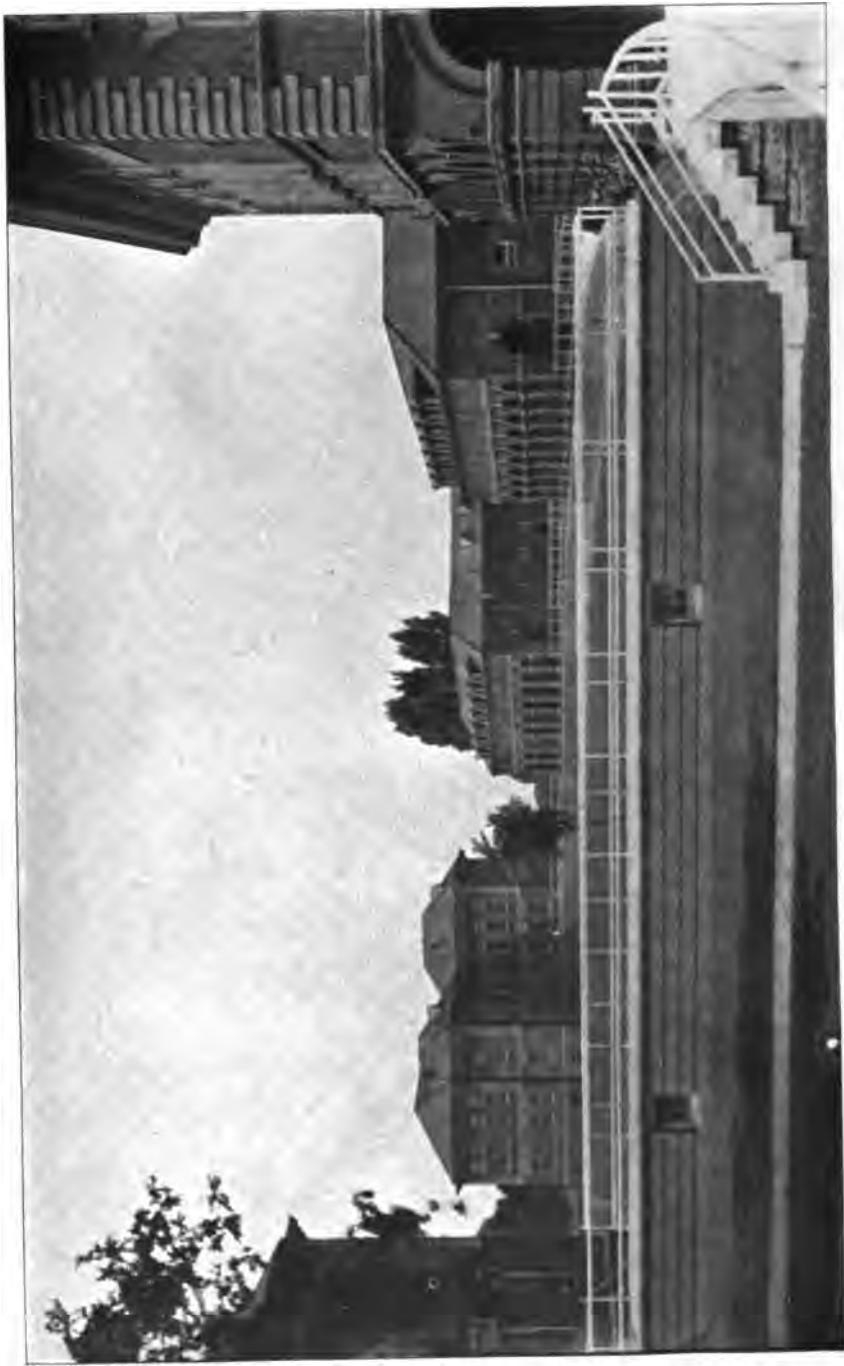
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STATE OF NEW YORK. *Legislature.*
Senate
ONE HUNDRED AND FORTIETH SESSION

1917

VOL. XIII.—Nos. 23 TO 28, INCLUSIVE



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1917



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SIXTY-FIRST ANNUAL REPORT

OF THE

Board of Managers

OF

THOMAS INDIAN SCHOOL

LOCATED ON THE

Cattaraugus Indian Reservation

AT

IROQUOIS, N. Y.

For the Year Ending June 30, 1916

TRANSMITTED TO THE LEGISLATURE JANUARY 30, 1917

ALBANY

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1917

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JOHN C. BRENNAN

Grade Teachers
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KATHERINE DUNHAM
GERTRUDE H. RAND
MARY M. BRENNAN

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DONNA I. COLLINS

Music Teacher
VERNA RANKE

Instructor in Carpentry
ANTON F. LORENZ

Seamstress
ETHIE V. PERKINS
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Nurse
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Housekeeper
AGNES REYNOLDS

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BESSIE CLUTE
MARY DONOVAN
JENNIE MAYNARD

Assistant Cook
MAMIE FOOTE

Domestic
GLADYS SENACA

Head Laundress
ELVIE WAKEFIELD

Mason and General Repairer
FRED PALMER

Farmer
CARL DANKERT

Gardner and Poultry Man
GEORGE KEYS

Laborers
ADOLPH DANKERT
JOHN HENRY
FRANK MAYNARD

Teamsters
FRANK HARRINGTON
THURSTON HAYNARD

STATE OF NEW YORK

No. 23

IN SENATE

JANUARY 30, 1917

Sixty-first Annual Report of the Thomas Indian School

To the Honorable, the Legislature of the State of New York:

In compliance with the statute, the undersigned, the Board of Managers of the Thomas Indian School of Iroquois, N. Y., beg to submit their report for the fiscal year ending June 30, 1916.

Inasmuch as five of the undersigned members were only appointed to serve on this board in May, we do not feel we are in a position to make a detailed report, but would refer you to the report of the superintendent attached hereto. This together with its auxiliary reports gives to quite an extent the present condition of the school, and also what is desired of the coming legislature.

With these we also transmit the Treasurer's Report, and the report of the Attending Physician.

Respectfully submitted,

WILLIAM S. LAWTON, *President*,
HERMAN W. JOHNSON, M. D., *Secretary*,
JOSEPHINE M. SISSON,
WILLIAM F. WOODWARD,
WALTER S. KENNEDY,
WILLIAM HATCH,
GRANT MT. PLEASANT.

REPORT OF SUPERINTENDENT

To the Board of Managers, Thomas Indian School:

In compliance with the statute, I present you herewith my report as superintendent for the year ending June 30, 1916.

The beginning of the fiscal year having been changed from October 1 to July 1, this report only covers a period of nine months.

On October 1, 1915, the population of the institution was 176, 99 girls and 77 boys. On June 30, 1916, our population was 198, 107 girls and 91 boys, the average population for the nine months being 195.244. This large average is due to the fact that this period did not include our two months' vacation, when many of our pupils either return to their homes or go out to service.

With a very few exceptions the personnel of the school has remained the same. Miss Alta J. Alden, a helpful and efficient employee for nearly nine years, resigned her position as stenographer and storekeeper to take effect December 1, and on December 8, was married to Mr. Albert Cross of Dewittville, N. Y. Our loss was his gain. Miss Helen M. O'Connor of Albany, N. Y., was chosen from the civil service list to fill the position made vacant by the resignation of Miss Alden.

Our school has been running along very much the same as in the previous year, except that we were obliged to abandon our Domestic Science department this year on account of our teacher not returning to us as we had expected her to do. This was a disappointment to us, for at that time we were not in a position to secure from the civil service list a domestic science teacher. I consider this branch of our school work one of the most important ones and I feel very anxious to give every girl enrolled here an opportunity to graduate in the Domestic Science department of our school. I trust we will be able to resume this branch of work when school opens on September 1, and before many years I hope we will be able to add to our curriculum a well regulated course in Agriculture for our boys.



WEAVING CLASS



KINDERGARTEN CLASS

The results of our regents' examinations were very satisfactory this year. Ten completed our course, besides many others passing in the different subjects they were permitted to try. The standard for graduation, adopted by this institution is the State Regents' Preliminary Examination. Any pupil holding a regents' preliminary certificate is entitled to enter any high school in the State without further examination.

Of the ten in our graduating class this year, Louise Tallchief, Lottie Bissell, Avis Sundown, Elliott Tallchief, expect to further their education by entering Haskell Institute at Lawrence, Kansas. Winifred Printup, Dennis Button, Henry Rockwell, Ulysses Johnson, are planning on entering the United States Indian School at Carlisle, Pa. The other two, Nettie Skye and Martha Green, have not yet decided just what they will do.

It has been our custom for several years to give our graduating class an automobile ride and picnic. This class enjoyed a very pleasant day by going through the botanical gardens in Buffalo and from Buffalo to East Aurora, spending considerable time at the Roycroft.

We have had more applications for the admission of children to the institution this year than ever before, having 130 applications on file at the present time. The Indian people are realizing more and more each year the value of a practical education and they are also realizing the opportunity given here for their children to receive such an education. This, I think accounts for the steady increase each year in applications. One of the hardest tasks I have to perform is to tell a parent or guardian who is anxious to have their child receive the advantages of this school, that our quarters are all full, we cannot take them. You can very readily understand that with such a long waiting list this has to be done frequently. I trust the coming legislature will grant us an appropriation for a new dormitory building, thus enlarging the capacity, of the institution.

The following appropriations, with explanations as to their needs, are desired of the coming legislature:

APPROPRIATIONS*Personal Service*

	Expended	Requested
	Oct. 1, 1915, to	for
	Sept. 30, 1916	1917-18
Personal service.....	\$23,717 19	\$30,620 00

This increase in the amount requested for 1917-18 over the amount expended for 1915-16 is to provide for requests made to the Salary Classification Commission for a few increases in salaries and the addition of an agricultural teacher. The amount requested also covers the maximum rate allowed for each position, for under the present system, where the salary for each position is specified in the appropriation, it is necessary to provide for the amount to which each incumbent might be entitled, although in many instances the full amount will not be expended. We have also made this request to cover an emergency fund of \$1,000, for under the present system no resource is provided for the employment of extra labor in case of emergency or no provision is made for the employment of a person to perform the duties of an employee injured in service and entitled to his or her regular compensation.

DEFICIENCY

Personal Service.....	\$285 00
------------------------------	-----------------

The salary appropriated for four positions for 1916-17 was at the rate then paid the incumbents and no allowance was made for the rate to which they would be entitled this year on account of time service.

MAINTENANCE AND OPERATION

	Expended	Requested
	Oct. 1, 1915, to	for
	Sept. 30, 1916	1917-18
Food	\$7,191 60	\$8,000 00

The amount of \$6,500 appropriated for 1916-17 is insufficient and a deficiency appropriation of \$1,500 is needed to

carry us through the year. This increase is necessary on account of a little larger population than formerly and the increase in the price of food stuffs.

Fuel, light, power and water..... \$4,335 79 \$5,000 00

The amount of \$4,200 appropriated for 1916-17 is insufficient and a deficiency appropriation of \$500 has been asked for. This is due principally to the increase in the contract price of coal.

Printing and advertising..... \$3 18 \$100 00

Equipment \$6,793 86 \$7,500 00

On account of a misunderstanding as to where various items were to be classified, the appropriation asked for 1916-17 was insufficient and a deficiency appropriation of \$1,700 has been requested. An increase is also necessary on account of the general rise in prices.

Supplies \$4,146 73 \$5,000 00

The amount of \$5,000 was appropriated for 1916-17 and the appropriation for 1917-18 should not be less on account of the rise in prices of nearly all articles of supplies.

Materials \$1,262 44 \$1,500 00

Traveling expenses..... 552 68 500 00

Communication 672 31 750 00

Fixed charges and contributions..... 531 00 720 00

General plant service..... 1,680 11 1,600 00

Rents 367 50 500 00

Contingencies 1,000 00

If in future the maintenance appropriations are to be divided, as under the present budget system, for institutions of this sort, where the inmates are dependent upon appropriations for food, clothing and other necessities, it is necessary that the allowance be liberal to provide for unexpected increases in expenditures. It is impossible to estimate very closely and in detail, the expenses maintaining an institution, for they will necessarily vary from year to year. For instance, quite a large portion of our food supplies are home products and as the last two seasons have been unfavorable to many

crops, there is a consequent shortage in home product food supplies and an increase in the amount which it is necessary to purchase.

If the appropriation is granted in a lump sum, as was done previous to last year, the amount remaining from those divisions which do not require the full amount estimated can be used for those divisions where the necessary expenditures exceed the estimated requirements and the institution can then be maintained on a smaller appropriation than is required under the present system.

DEFICIENCY

Food \$1,500 00

A deficiency appropriation is necessary under this division of maintenance on account of a little larger population than formerly, the increase in the price of food stuffs and a shortage in home product food supplies.

Fuel, light, power and water..... \$500 00

A deficiency appropriation is needed under this division on account of the increase in the contract price of coal.

Equipment \$1,700 00

We find that various articles which we have classed under divisions are to be classed under equipment. We did not, therefore, include enough under this division in making up our list of requests for 1916-17. Our estimate was also insufficient on account of the general rise in prices.

CONSTRUCTION AND REPAIRS

For kindergarten building with connecting conduit. \$60,000 00

The institution at present is overcrowded and we have over 150 applicants waiting to be admitted. In this building we wish to care for from forty to fifty children of kindergarten age, furnishing them with sleeping apartments, dining room, kitchen, living room, school room and providing the necessary apartments for caretakers.

For work done by contract or upon estimate for the purchase of material and the employment of labor in addition to that regularly appropriated for elsewhere, for repairs to buildings and to equipment..... \$1,000 00

This amount is intended to cover repairs to ice house, repairs to piggery, painting, papering, repairs to roofs and masonry and general repairs to building and equipment.

For industrial building with connecting conduit... \$50,000 00

The present facilities for industrial work are very limited and we are unable to do much in this line except in carpentry. For this work we are using an old building which is in a very dilapidated condition and not sufficient in size. We wish to broaden the industrial training along various lines to include agriculture, blacksmithing, plumbing, steam fitting, etc.

REAPPROPRIATION

New ice house, dairy room and cold storage..... \$7,500 00

We have been endeavoring to get this work done under contract but find that the appropriation is not sufficient to permit us to do so. We are now planning to have the work done by the institution but we will not be able to begin the work before spring and will not have time to complete it before the appropriation lapses.

After asking the legislature several years for an appropriation to repair the corridors connecting the different buildings, the first corridors having been built out of old material taken from the old buildings, the 1914 legislature gave us \$5,000 to use as far as it would go for this work. It was impossible to let this work by contract, the amount of the appropriation being too small to complete the work, so I decided to take some of our regular employees, secure some extra help and see how far we could make this appropriation go. I took Mr. Brennan, the principal of our school, from his regular work and put him in charge. The result was certainly gratifying, for we only had to ask the 1916 legislature for \$1,000

more to finish the corridors. They add greatly to the looks of the institution besides eliminating the constant fear we have had for some time of some one falling through, and perhaps breaking a leg or otherwise injuring themselves.

As this experiment worked out so satisfactorily, we decided to see what we could do with our two small appropriations of \$2,500 each that had been given us by the 1914 and 1916 legislatures for an addition to our dairy barn. These sums were not sufficient to let this work by contract, so on May 1, we started upon that work. I feel confident we will be able to complete this addition within the amount of these appropriations by using some of our employees as we did on the corridors. The great objection to using our regular employees on special fund work is that, of a necessity, our regular work has to suffer, for our force is not large enough to keep things up as they should be, even if they spend all of their time at their regular duties.

On Thanksgiving eve a fitting exercise was given by the pupils and on the following day, officers, employees, and pupils enjoyed our Thanksgiving dinner together as usual, in the main dining room. The tables were arranged artistically and the decorations were appropriate for the occasion. The following menu was served: Roast turkey with stuffing, mashed potatoes, gravy, turnips, celery, fruit salad, cranberries, pickled peaches, bread, butter, pumpkin pie, cheese, coffee.

The pupils helping with the Christmas cantata rendered their parts in a very pleasing manner. The usual number of gifts, nuts, candies, and oranges were purchased for the pupils and all seemed to be very happy. On Christmas day every one partook of a roast turkey dinner and on New Year's day all enjoyed a chicken pie dinner.

One evening during holiday week we were delightfully entertained by Miss Mable Powers of East Aurora. Her readings were in keeping with the season of the year.

Mr. Henry R. Howland, who was associated with this institution for sixteen years, serving as president of our board, gave us a very instructive and entertaining lecture on Abraham Lincoln, February 12. We all enjoyed having him with us again.

Many people from the reservation and Versailles enjoyed with us on March 28 the "Kitchen Band" of Gowanda, N. Y. Their program was interesting and amusing, their instruments were unique, and every one proved herself an artist along her line.

The cantata rendered by the pupils on the evening of Easter Sunday was enjoyed not only by the people here, but by many from the reservation. It is our endeavor to observe all holidays in a manner fitting the occasion.

The following is the program rendered on closing week:

PROGRAM

Sunday, June 25, 3:30 p. m.....	Baccalaureate Sermon Rev. J. Emory Fisher.
Monday, June 26, 7:30 p. m.....	Musical
Tuesday, June 27.....	Picnic for Graduates
Wednesday, June 28, 7:30 p. m.....	Operetta Given by Fifty Pupils.
Friday, June 30, 7:45 p. m.....	Closing Exercises

The baccalaureate sermon was inspiring and contained excellent advice to the class. All enjoyed it and, I trust will be made better for the instruction and advice contained in it.

The musical given on June 26 was enjoyed by many of the parents and friends of our pupils. The following is the program:

PROGRAM

Piano Duet—"Charge of the Uhlans".....	<i>Bohm</i> Nettie Skye, Irene Williams.
Two Part Choruses (a) "I Would That My Love".....	<i>Mendelssohn</i>
(b) "Beautiful Moonlight".....	<i>Glover</i> Girls' Voices.
Piano Solo—"Cooing Doves".....	<i>Petrie</i> Avis Sundown.
Piano Solo—"Tales of Hoffman".....	<i>Offenbach</i> Elizabeth Snyder
Clarinet Solo—"Hear Me Norma".....	<i>Bellini</i> Elmer Jacobs.

Unison Chorus—"A Rose Song"	<i>Parker</i>
Girls' Voices.	
Piano Solo—"Moonlight on the Waves"	<i>Verner</i>
Edith Loft	
Piano Solo—"Naricussus"	<i>Nevin</i>
Pauline Lay.	
Vocal Solo—"Polka de Concert"	<i>Andrews</i>
Louise Tallchief.	
Vocal Solo—"Sailing"	<i>Veazie</i>
Vocal Solo—"Ave Maria"	<i>Gounod</i>
Barney Jacobs.	
Piano Solo—"In Dreamland"	<i>Verner</i>
Nettie Skye.	
Piano Duet—"Zampa Overture"	<i>Herold</i>
Pauline Lay, Louise Tallchief.	

It has been our custom for several years, when the weather would permit, to hold our closing exercises on the lawn, owing to our hall not being large enough to accommodate the people who wish to attend. As the weather was so uncertain at this time, raining nearly every day, we hardly knew how to plan, but finally decided the best way out of our dilemma was to procure a tent, and our last two evening's entertainments were enjoyed very much under the tent where everybody was made comfortable.

The operetta, given by fifty of our pupils on Wednesday evening certainly reflected great credit upon the teachers who had it in charge, as well as the pupils. It was enjoyed by a large number from the reservation as well as from the surrounding towns. On Friday evening, June 30, the following program was rendered:

PROGRAM

March—"Director"	<i>Lay's Seneca Band</i>
Invocation	<i>Rev. R. H. Fairburn</i>
Piano Duet—"Galop Caprice"	<i>Russell</i>
Nettie Skye, Avis Sundown."	
Kindergarten Exercise	<i>Little Farmers</i>
Clarinet Solo	<i>Selected</i>
Elmer Jacobs.	



GRADUATING CLASS OF 1916



HAYING

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Chorus—"Song of Spring".....	Pearson
Violin Solo—"Elysium".....	Spaulding
	Barney Jacobs.
May Pole Drill.....	Eight Girls
Overture—"Silver Bell".....	Lay's Seneca Band
Address.....	Rev. John N. Steel
Selection—"National Airs".....	Lay's Seneca Band
Presentation of Diplomas.....	Rev. J. Emory Fisher
Benediction.....	Rev. Filmore Jackson

Many words of encouragement and advice were given our class by Rev. John N. Steel, of Syracuse, N. Y., in his inspiring and instructive address. Mr. Steel during his different visits to the reservation won the hearts of the people here at the institution as well as the people on the reservation and we were all delighted to have him with us again.

The music furnished by Lay's Seneca band from year to year is always enjoyed, and I wish to express my sincere thanks to them in helping to make our closing night enjoyable. I also want to thank one and all for generous donations of papers, magazines, clothing, Christmas packages, etc. These all mean much to the pupils.

I wish to take this opportunity to thank officers, teachers and employees for the loyalty, co-operation and assistance they have given me. They have been devoted and faithful in their duties and have contributed much toward the prosperity of the institution.

Respectfully submitted,

EMILY P. LINCOLN,
Superintendent.

SCHOOL DEPARTMENT

To Mrs. Emily P. Lincoln, Superintendent:

I submit herewith my report for the school department for the year ending June 30, 1916.

The enrollment in the various grades during the past year was as follows:

Kindergarten

Milton Abrams,
 LeRoy Gates,
 Harry Green,
 Wilson Jacobs,
 Thomas Jacobs,
 Luman Jackson,
 William Jones,
 LeRoy Jones,
 Glenny Jimerson,
 Foster Jonathon,
 Herbert John,
 Angus Chubb,
 Angus Lazore,

Isaac Jacobs,
 Clifford John,
 Wilbert Bigtree,
 Kenneth George,
 Thelma Bissell,
 Alta Button,
 Flora Jimerson,
 Lena Jimerson,
 Cynthia Jimerson,
 Evelyn John,
 Armena Scott,
 Bessie Shongo,
 Ruby White.

First Grade

Elon Bennett,
 Clifford Bowen,
 Leo Cooper,
 Lester Eals,
 Floyd John,
 Nathan Jones,
 Ernest Jonathon,
 William Pierce,

Ethel Bissell,
 Hattie Bissell,
 Hattie Cusick,
 Iva Jackson,
 Bertha Lee,
 Doris Pierce,
 Sophelia White,
 Edna May White.

Second Grade

Delos Beckman,
 Chester Bred,
 Nelson Chew,
 Stanley George,
 William Harris,
 Oscar Hess,
 Mitchell Luke,
 Elon Logan,
 Victor Pierce,

Gilbert Peters,
 Lucy Abrams,
 Mamie Jackson,
 Agnes Jones,
 Elsie Jimerson,
 Eunice Lay,
 Gwendolyn Pierce,
 Mitchell Jacobs.

Third Grade

Willie Abrams,
 Irving Bissell,
 Charles Bissell,
 Archie Bowen,
 Peter Crow,
 Paul Dean,
 Cephas Hill,
 Alton Joe,
 Mitchell Jackson,
 Sylvester Sundown,
 Geneva Bowen,
 Reva Cooper,
 Viola Cusick,
 Aleta Chew,

Lillian Huff,
 Elizabeth Harris,
 Evangeline Halftown,
 Margaret John,
 Bessie Jones,
 Delphine Pierce,
 Rhea Pierce,
 Doris Parker,
 Mary Tarbell,
 Iva Tallchief,
 Mary Titus,
 Ethel White,
 Anna Sundown,
 Elsie Sundown.

Fourth Grade

Clifford George,
 Edward Jackson,
 Raymond John,
 Archie Logan,
 Ernest Lee,
 Belmont Loft,
 Nelson Ninham,
 Jabez Pierce,
 Jerome Skye,
 Stanley Eeles,
 Stanley Huff,

Hattie Cornplanter,
 Irene Cusick,
 Dorothy Harris,
 Marjorie Jacobs,
 Myrtle Jones,
 Rose Lee,
 Iva Reuben,
 Sarah Tarbell,
 Edith Tallchief,
 Loretta Titus.

Fifth Grade

Cora Abrams,
 Josephine Bred,
 Louise Bissell,
 Leona Button,
 Jerry Cooper,
 Elsie Crouse,

Effie Luke,
 Maxwell Lay,
 Thomas MacUmer,
 Mary Moses,
 Fleeta Nephew,
 Carrie Philips,

William Ground,
 Gilbert Halftown,
 Stewart Huff,
 Peryl Johnson,
 Mary Halftown,
 Burt Jimerson,
 Edna Jones,
 Alyce Kennedy,
 Harriet Lay,

Warren Pierce,
 Edna Parker,
 Geraldine Sundown,
 Franklin Senaca,
 Jacob Shongo,
 Agnes Snyder,
 Noah Twoguns,
 Lawrence Williams.

Sixth Grade

Gertrude Armstrong,
 Joseph Bissell,
 Maude Bennett,
 Amy Blackchief,
 Betsey Carpenter,
 Victor Doxtator,
 Amelia Dowdy,
 Andrew Francis,
 Fidelia Ground,
 Lydia Harris,
 Hilton Henhawk,
 Herman Jones,
 Ethelyn Joe,
 Bula Jacobs,

Flossie Kettle,
 Mabel Kettle,
 Mabel Lee,
 Nellie Lee,
 Augustus Moses,
 Izora Parker,
 Myra Pierce,
 Nora Sandy,
 Roland Sundown,
 Hazel Shongo,
 Eva Twoguns,
 Percy White,
 Elean Webster.

Seventh Grade

Ely Ground,
 Elmer Jacobs,
 Dennison Moses,
 Henry Pierce,
 Torrence Redeye,
 Herman Shongo,
 Alice Garlow,
 Clarinda Jackson,
 Viola Jones,
 Lucy Kennedy,
 Emeline Lewis,

Edith Loft,
 Beulah Parker,
 Mildred Parker,
 Ida Patterson,
 Minna Patterson,
 Elsie Pierce,
 Letha Shongo,
 Elizabeth Snyder,
 Malphena Thompson,
 Pauline Wandle.

Eighth Grade

Dennis Button,	Martha Green,
Barney Jacobs,	Pauline Lay,
Ulysses Johnson,	Jessie Pierce,
Amos Jones,	Winifred Printup,
Newman La Forte,	Nettie Skye,
Emery Miller,	Elsie Spring,
Henry Rockwell,	Avie Sundown,
Elliot Tallchief,	Louise Tallchief,
Nelson Twoguns,	Lucy Thompson,
Lottie Bissell,	Irene Williams.
Lorenza Bullis,	

The work progressed very well along the usual lines of activity. Ten completed our literary course and were graduated last June.

The music work proved interesting throughout the year, and the musical programs rendered during our closing week last spring were very gratifying. All pupils received instruction in the theory of music and the following pupils received instrumental lessons.

Organ Pupils

Flossie Kittle,	Viola Jones,
Bula Jacobs,	Alyce Kennedy,
Geraldine Sundown,	Mary Moses,
Maud Bennett,	Nellie Lee,
Ethelyn Joe,	Nora Sandy.

Piano Pupils

Alice Garlow,	Fidelia Ground,
Elsie Spring,	Pauline Jimerson,
Avis Sundown,	Elizabeth Snyder,
Lottie Bissell,	Mildred Parker,
Louise Bissell,	Martha Greene,
Harriet Lay,	Letha Shongo,
Edith Loft,	Lucy Kennedy,
Louise Tallchief,	Clarinda Jackson,
Elsa Pierce,	Nina Patterson,
Irene Williams,	Nettie Skye.
Lorenza Bullis,	

I regret to report that for lack of a teacher the domestic science work was discontinued for the year.

A great deal was accomplished in the sewing classes, not only in teaching the girls to sew, but furnishing the institution with the products of the classes. In the junior class considerable embroidery work and crocheting was also done.

Usual interest was manifested in the weaving work. During the last part of the term all the 7th and 8th grade girls received instruction in weaving. During the year 64 rugs were woven, valued at from \$1.00 to \$5.00 each.

I wish to thank you as superintendent and all the teachers for support and co-operation during the past year.

Respectfully submitted,

(Signed) JOHN C. BRENNAN,

Principal.

MATRON'S REPORT.

To Mrs. Emily P. Lincoln, Superintendent:

It has been a great disappointment to me that we were not able to continue our domestic science course, for I feel it is very important that every girl should know how to sew and cook. Our girls take to this branch in our course and I sincerely hope we will be able to resume this work at the beginning of the next school year.

The following is a list of articles manufactured in the past nine months by the two seamstresses and pupils:

Aprons, gingham.....	82
Aprons, fancy.....	1
Aprons, milkman's.....	2
Bibs	36
Caps, hospital.....	6
Covers, corset.....	32
Covers, dresser.....	18
Covers, mattress.....	24
Costumes	72
Curtains, pair.....	22
Curtains, cupboard, pair.....	4

Doilies with crocheted edge.....	11
Drawers, pair.....	128
Dresses, blue.....	132
Dresses, crepe.....	2
Dresses, light.....	106
Dresses, white for graduates.....	6
Dresses, wool.....	23
Jackets, blue.....	42
Lace, crocheted, yards.....	70
Napkins, sanitary.....	35
Napkins, table, dozen.....	12
Night dresses.....	62
Night shirts.....	104
Pillow cases, pair.....	271
Pillow cases, fancy, pair.....	1
Pants, cotton, pair.....	41
Pants, wool, pair.....	69
Shirts, dark.....	70
Shirts, light.....	50
Suspenders, pair.....	32
Suits, milking.....	4
Strainers	9
Sheets	177
Sheets, hemstitched.....	1
Towels, dish.....	96
Towels, fancy.....	3
Towels, hand.....	225
Towels, huck.....	146
Table cloths, red.....	24
Table cloths, white.....	7
Underskirts	26
Underwaists	68
Waists, blue.....	79
Waists, white.....	20

Respectfully submitted,

HALLA WELLS,
Matron.

TRADE SCHOOL

To Mrs. Emily P. Lincoln, Superintendent:

Owing to the institution doing so much work under special appropriation my pupils have had considerable more experience this year on work connected with building, cement and repair work and not so much with the making of new furniture as some previous years. I feel that this work has been valuable to the boys and that they are deserving of credit for the way in which they have taken hold of all the different kinds of work during this school period.

I have had eleven pupils in my classes and the following list is what has been accomplished:

- 40 kindergarten chairs, oak.
- 1 filing case.
- 1 cornet case.
- 1 trombone case.
- 2 wheels (engine room).
- 1 dozen egg crates (poultry farm).
- 8 crosses, 18 x 21.
- 6 window frames for cow barn.
- 3 door frames for cow barn.
- 2 sub jams for doors.
- 12 pitched sub jams for windows.
- 1 box (engine room).
- 20 feet picket fence and posts.
- 2 large kitchen cabinets.
- 1 inlaid checker table.
 stairs for boys' building.
- 16 window frames and sash.
- 150 lineal feet of moulding.
- 160 lineal feet frames for cement moulding.
 - 1 wood screw form for steps.
 - 1 corner shelf for cottage.
 - 2 hydrant boxes.
 - 1 case.
 - 4 broom racks.
 - 1 filing case (108 pigeon holes, 4 x 4).



OPERETTA GIVEN AT CLOSE OF SCHOOL



OPERETTA GIVEN AT CLOSE OF SCHOOL

- 1 office desk and chair (engine room).
- 2 laundry trays with wheels.
- 4 Magazine racks.
- 3 tabourets.
- 1 ladies' desk.
- 15 picture frames.
- 1 library table for administration building.
- 1 library table with drawer.

Respectfully submitted,

(Signed) ANTON F. LORENZE,
Instructor in Carpentry.

REPORT OF THE STEWARD

To Mrs. Emily P. Lincoln, Superintendent:

I submit to you herewith my report for the nine months ending June 30, 1916.

Total value of real estate June 30, 1916..... \$201,667 82

As the Thomas Indian School is situated on the Cattaraugus Indian Reservation, the farm land has no market value, but this is included at the relative value of farm land in the adjoining territory.

Total value of personal property June 30, 1916... 31,204 96

Total value of institution property..... \$232,872 78

Number of acres of land owned by institution....	100
Number of acres of land rented.....	120
Number of acres of land occupied by buildings....	25

FARM AND GARDEN

Number of acres of land in garden.....	10
Number of acres of land in orchard, vineyard and berries	7
Number of acres of land in potatoes.....	12

Number of acres of land in meadow.....	36
Number of acres of land in pasture.....	43
Number of acres of land in field crops.....	87
Total number of acres devoted to farm purposes	195

GARDEN*Debit*

Cost of seed, fertilizer, implements and labor.....	\$277 73
Value of home product seed and fertilizer.....	60 28
Total	<u>\$338 01</u>

Credit

Horseradish, 87 pounds.....	\$3 48
Lettuce, 122 pounds.....	6 10
Onions, green, 1,670 pounds.....	33 40
Radishes, tops on, 69 pounds.....	1 73
Rhubarb, 1,183 pounds.....	23 66
Total	<u>\$68 37</u>
Loss	<u>\$269 64</u>

FRUIT*Debit*

Cost of stock, spraying materials, labor, implements, etc.....	\$132 29

Credit

Strawberries, 412 quarts.....	\$32 96
Loss	<u>\$99 33</u>

POTATOES

Debit

Cost of seed, spraying material, implements and labor	\$327 43
Value of home product manue.....	300 00
	<hr/>
	\$627 43

Credit

None harvested.....	9 00
	<hr/>
Loss	\$627 43
	<hr/>

FIELD CROPS

Debit

Cost of seed, fertilizer, rent of land, implements and labor	\$1,415 01
Value of home product seed and fertilizer.....	957 88
	<hr/>
Total	\$2,372 89
	<hr/>

Credit

Alfalfa, green, 2 tons.....	\$17 00
Ice, 310 tons.....	310 00
	<hr/>
Total	\$327 00
	<hr/>
Loss	\$2,045 89
	<hr/>

DAIRY

Debit

Feed purchased.....	\$355 43
Field crops, home product.....	1,102 55
Veterinary services.....	12 25
Labor	375 00

Farming implements.....	12 00
Rent of pasture.....	75 00

	\$1,932 23
Inventory of stock October 1, 1915.....	1,835 00

Total	\$3,767 23

Credit

Cream, 1,203 3-4 quarts.....	\$300 94
Milk, 8,281 quarts.....	351 94
Butter, 2,404 pounds.....	752 58
Buttermilk, 4,811 quarts.....	96 22
Milk, skimmed, 33,770 quarts.....	675 40
Beef, 2,516 pounds.....	305 94
Stock sold.....	10 00
Hides sold.....	37 28
Value of manure.....	762 50
Services	1 50

	\$3,294 30
Inventory of stock June 30, 1916.....	1,665 00

Total	\$4,959 30

Profit	\$1,192 07

Average number of cows milked during nine months	\$19 48
Average production per cow (lbs.).....	5249.4

SWINE*Debit*

Feed purchased.....	\$35 38
Field crops, home product.....	280 38
Veterinary services.....	5 24

Labor	100 00
Implements	10 00
<hr/>	
	\$431 00
Inventory of stock October 1, 1915.....	427 00
<hr/>	
Total	\$858 00
<hr/>	

Credit

Pork, 3,744 pounds.....	\$374 40
Value of manure.....	96 88
Services	1 00
<hr/>	
	\$472 28
Inventory of stock June 30, 1916.....	594 00
<hr/>	
Total	\$1,066 28
<hr/>	
Profit	\$208 28
<hr/>	

POULTRY*Debit*

Eggs used for hatching, 144 7-12 dozen.....	\$43 38
Feed purchased.....	224 88
Field crops, home product.....	204 34
Labor	175 00
Implements and supplies.....	20 66
<hr/>	
	\$668 26
Inventory of stock October 1, 1915.....	922 00
<hr/>	
Total	\$1,590 26
<hr/>	

Credit

Stock sold.....	\$1 00
Eggs, 2,486 7-12 dozen.....	745 98

Fowls, dressed, 196 1-2 pounds.....	31 44
Chickens, dressed, 507 pounds.....	101 40
Value of manure.....	90 00

	\$969 82
Inventory of stock June 30, 1916.....	1,083 50

Total	\$2,053 32

Profit	\$463 06

On account of the period covered by this report, there is a considerable loss shown in the products of the farm, except under the different divisions of farm stock. The greater part of the year's expenses are incurred during this period, but not many credits are shown as only a few crops have yet been harvested.

Respectfully submitted,

IDA L. BUNN,
Steward.

REPORT OF THE FARMER

To Mrs. Emily P. Lincoln, Superintendent:

Aside from doing the regular farm work during the last nine months, the teams have helped out considerably with the extra work being done by the institution under special appropriations. I want to say here that I am very much pleased with the prospect of our having the long needed and long talked of addition to the dairy barn. If the work continues to progress as rapidly as it has the last two months it will not be long before this addition is completed.

In addition to the institution farm, we are working about 120 acres of rented land. If weather conditions are at all favorable, I feel sure we will have satisfactory results from our crops this year. The average number of cows milked during this nine months' period is about twenty.

The following is an inventory of the stock on hand June 30, 1915:

11 work horses.....	\$2,020 00
3 driving horses.....	535 00
3 colts	360 00
20 cows	1,200 00
6 heifers	240 00
5 calves	125 00
1 bull	100 00
4 breed sows.....	100 00
1 boar	30 00
40 shoats	425 00
13 pigs	39 00

Respectfully submitted,

CARL DANKERT,
Farmer.

**REPORT OF EMILY P. LINCOLN, TREASURER, FOR
THE YEAR ENDING JUNE 30, 1916**

Receipts

Cash on hand July 1, 1916.....	\$438 39
Received from Comptroller.....	40,300 00
Miscellaneous receipts.....	109 57
<hr/>	
	\$40,847 96

Disbursements

Wages and labor.....	\$18,381 71
Provisions	5,814 36
General supplies.....	1,344 11
Clothing	2,524 29
Fuel and light.....	3,796 77
Hospital and medical supplies.....	29 63
Transportation and traveling expenses.....	14 11
Farm and garden.....	2,866 31
Ordinary repairs and shops.....	1,565 20

Furniture and furnishings.....	1,549	69
Miscellaneous	2,249	24
Lawns, roads, grounds.....	93	53
Remittance to State treasurer.....	109	57

	\$40,328	52

Cash on hand June 30, 1916.....	519	44

	\$40,847	96

Per capita cost of maintenance.....		\$205.988

STATEMENT OF ATTENDANCE FOR A NINE MONTHS' PERIOD ENDING JUNE 30, 1916

Number of pupils enrolled in institution October 1, 1915	176
Number of pupils admitted during the nine months	30
Number of pupils discharged during the nine months	8
Number of pupils died during the nine months....	0
Number of pupils in institution June 30, 1916....	198
Average population for the nine months ending June 30, 1916.....	195.244

REPORT OF ATTENDING PHYSICIAN

To the Board of Managers:

I beg to submit herewith, my report as attending physician, for the part of the fiscal year beginning October 1, 1915, and ending June 30, 1916.

The following is a list of diseases and injuries which have been under treatment during the above stated time:

Abscess	2	Peterygium	2
Anaemia	2	Rheumatism, acute.....	1
Boils	1	Ringworm	1
Conjunctivitis	4	Scabies	2



CHRISTMAS EXERCISE



CONSTRUCTING ADDITION TO DAIRY BARN

Contusion, foot.....	1	Tonsillitis	1
Dyspepsia, acute.....	4	Tuberculosis of lungs.....	1
Eczema	2	Tuberculosis of glands.....	4
Erysipelas	1	Ulcer of cornea.....	1
Fracture, forearm.....	1	Wound, arm.....	1
Hernia	3	Wound, leg.....	1
Impetigo	4	Wound, scalp.....	2
Inflammation mid. ear.....	3	Wound, finger.....	1
Influenza	33	Wound, thumb.....	1
Pneumonia	2		

An excellent sanitary condition has been maintained throughout the institution. There is one feature, however, connected with the physical welfare of the pupils, to which I particularly desire to call your attention. This is the over-crowding of the buildings. These structures were designed for the occupancy of 160 pupils, the present population is 200, necessitating the non-observance of the law requiring the provision of 600 feet of air space in the dormitories, for each individual, and adding greatly to the danger of infection, if communicable disease should occur.

The demand from the various reservations of the state, for the care and education of their indigent Indian children is insistent and urgent. If this demand is to be met here it can only be done by the erection of an additional building. I trust that this may be speedily.

Very respectfully,

(Signed) A. D. LAKE,
Attending Physician.

CATALOG OF CHILDREN WITH THEIR NATIONALITY AND THE RESERVATION FROM WHICH EACH CAME

ALLEGHANY RESERVATION

<i>Females</i>	<i>Nationality</i>
Bowen, Geneva.....	Seneca
Cooper, Reva.....	Seneca
Halftown, Mary.....	Seneca
Halftown, Evangeline.....	Seneca
Harris, Dorothy.....	Cayuga

Harris, Elizabeth.....	Cayuga
Jackson, Clarinda.....	Seneca
Jimeson, Cynthia.....	Seneca
Jimeson, Lena.....	Seneca
Jimeson, Flora Marie.....	Seneca
Jones, Bessie.....	Seneca
Lee, Mabel.....	Seneca
Lee, Nellie.....	Seneca
Lee, Rosa.....	Seneca
Lee, Bertha.....	Seneca
Lewis, Emeline.....	Seneca
Moses, Mary.....	Seneca
Shongo, Hazel.....	Seneca
Shongo, Letha.....	Seneca
Synder, Agnes.....	Seneca
Snyder, Elizebeth.....	Seneca
Titus, Loretta.....	Seneca
Titus, Mary.....	Seneca
Wandle, Pauline.....	Seneca
White, Ethel.....	Onondaga

*Males**Nationality*

Bowen, Archibald.....	Seneca
Bowen, Clifford.....	Seneca
Cooper, Leo.....	Seneca
Gates, Le Roy.....	Seneca
Halftown, Gilbert.....	Seneca
Harris, William.....	Cayuga
Henhawk, Hilton.....	Seneca
Huff, Stanley.....	Seneca
Jimerson, Burt.....	Seneca
Jimeson, Gleeny T.....	Seneca
John, Floyd.....	Seneca
Jones, Le Roy.....	Seneca
Lee, Earnest.....	Seneca
Pierce, Victor.....	Seneca
Shongo, Herman.....	Seneca
Shongo, Jacob.....	Seneca

CATTARAUGUS RESERVATION

<i>Females</i>	<i>Nationality</i>
Abrams, Lucy.....	Seneca
Armstrong, Gertrude.....	Seneca
Bennett, Maud.....	Seneca
Bullis, Lorenza.....	Seneca
Button, Alta.....	Seneca
Button, Leona.....	Seneca
Cornplanter, Hattie.....	Seneca
Crouse, Elsie.....	Seneca
Dowdy, Amelia.....	Seneca
Green, Martha.....	Seneca
Harris, Lydia.....	Seneca
Huff, Lillian.....	Seneca
Jackson, Ivy.....	Seneca
Jackson, Mamie.....	Seneca
Joe, Ethelyn.....	Seneca
John Evelyn.....	Seneca
John, Margaret.....	Seneca
Kennedy, Alyce.....	Seneca
Kennedy, Lucy.....	Seneca
Kettle, Flossie.....	Seneca
Kettle, Mabel.....	Seneca
Lay, Eunice.....	Seneca
Lay, Harriet.....	Cayuga
Lay, Pauline.....	Cayuga
Luke, Effa.....	Seneca
Nephew, Fleeta.....	Seneca
Parker, Doris.....	Seneca
Parker, Edna.....	Seneca
Philips, Carrie.....	Cayuga
Pierce, Delphine.....	Seneca
Pierce, Gwendolyn.....	Seneca
Pierce, Elsa.....	Cayuga
Printup, Viola.....	Onondaga
Printup, Winifred.....	Seneca
Sandy, Nora.....	Seneca
Scott, Armena.....	Seneca
Shongo, Bessie.....	Seneca

Tallchief, Edith.....	Tuscarora
Tallchief, Iva.....	Tuscarora
Tallchief, Louise.....	Seneca
Thompson, Lucy.....	Seneca
Thompson, Malvina.....	Seneca
Twoguns, Eva.....	Seneca
White, Ruby.....	Seneca
White, Edna May.....	Seneca

*Males**Nationality*

Bennett, Elon.....	Seneca
Bullis, Jacob.....	Seneca
Button, Dennis.....	Seneca
Cooper, Jerriet.....	Seneca
Crow, Peter.....	Seneca
Doxtader, Victor.....	Seneca
Eels, Lester.....	Seneca
Eels, Stanley.....	Seneca
Green, Harry.....	Seneca
Huff, Steward.....	Seneca
Jackson, Luman.....	Seneca
Joe, Atlas Alton.....	Seneca
John, Clifford.....	Seneca
John, Herbert.....	Seneca
John, Raymond.....	Seneca
Lay, Maxwell.....	Cayuga
Luke, Mitchell.....	Seneca
Pierce, Henry.....	Seneca
Pierce, Jabez.....	Seneca
Pierce, Warren.....	Seneca
Pierce, William.....	Seneca
Redeye, Torrence.....	Seneca
Printup, Edward.....	Onondaga
Seneca, Franklin.....	Seneca
Tallchief, Elliott.....	Seneca
Twoguns, Nelson.....	Seneca
Twoguns, Noah.....	Seneca
White, Percy.....	Seneca

ONEIDA RESERVATION

<i>Males</i>	<i>Nationality</i>
Miller, Emery.....	Oneida
Rockwell, Henry.....	St. Regis

ONONDAGA RESERVATION

<i>Females</i>	<i>Nationality</i>
Bred Josephine.....	Oneida
Cole, Mable.....	St. Regis
Jacobs, Bula.....	Onondaga
Jacobs, Marjorie.....	Onondaga
Jones, Agnes.....	St. Regis
Jones, Edna.....	St. Regis
Loft, Edith.....	Mohawk

Males *Nationality*

Beckman, Deloss.....	Onondoga
Bread, Chester.....	Oneida
George, Clifford.....	Seneca
George, Stanley.....	Seneca
George, Kenneth Le Roy.....	Onondaga
Jacobs, Barney.....	Cayuga
Jacobs, Elmer.....	Cayuga
Jacobs, Thomas.....	Onondaga
Jacobs, Wilson.....	St. Regis
Johnson, Perl.....	Onondaga
Johnson, Ulysses.....	Onondaga
Jones, Amos.....	St. Regis
La Forte, Newman.....	St. Regis
Loft, Belmont.....	Mohawk
Logan, Elin.....	Onondaga
Logan, Archie.....	Onondaga
Ninham, Nelson.....	Oneida
Webster, Elean.....	Onondaga

ST. REGIS RESERVATION

<i>Females</i>	<i>Nationality</i>
Tarbell, Mary	St. Regis
Tarbell, Sara	St. Regis

<i>Males</i>	<i>Nationality</i>
Bigtree, Hilbert.....	St. Regis
Chubb, Angus.....	St. Regis
Dean, Paul.....	St. Regis
Francis, Andrew.....	St. Regis
Jackson, Edward.....	St. Regis
Jackson, Mitchell.....	St. Regis
Jacob, Isaac.....	St. Regis
Jacob, Mitchell.....	St. Regis
Lazor, Angus.....	St. Regis
McCumber, Thomas.....	St. Regis

TONAWANDA RESERVATION

<i>Females</i>	<i>Nationality</i>
Abrams, Cora.....	Seneca
Blackchief, Amy.....	Seneca
Carpenter, Betsey.....	Seneca
Ground, Fidelia.....	Seneca
Jimerson, Elsie.....	Seneca
Jones, Myrtle.....	Seneca
Jones, Viola.....	Seneca
Parker, Bula.....	Seneca
Parker, Mildred.....	Seneca
Parker, Izora.....	Seneca
Reuben, Iva.....	Seneca
Skye, Nettie.....	Seneca
Spring, Elsie.....	Tonawanda
Sundown, Anna.....	Seneca
Sundown, Avis.....	Seneca
Sundown, Elsie.....	Seneca
Sundown, Geraldine.....	Seneca
White, Sophelia.....	Seneca

<i>Males</i>	<i>Nationality</i>
Abrams, William.....	Seneca
Abrams, Milton.....	Seneca
Ground, Ely.....	Seneca
Ground, William.....	Seneca

Hill, Cephas.....	Seneca
Jonathon, Earnest.....	Seneca
Jonathon, Foster.....	Seneca
Jones, Herman.....	Seneca
Moses, Denison.....	Seneca
Moses, Augustus.....	Seneca
Peters, Gilbert.....	Seneca
Skye, Jerome.....	Seneca
Sundown, Roland.....	Seneca
Sundown, Sylvester.....	Seneca

TUSCARORA RESERVATION

*Females**Nationality*

Bissell, Ethel.....	Mohawk
Bissell, Hattie.....	Tuscarora
Bissell, Lottie.....	Mohawk
Bissell, Louise.....	Mohawk
Bissell, Thelma.....	Mohawk
Chew, Leta.....	Seneca
Cusick, Irene.....	Tuscarora
Cusick, Viola.....	Tuscarora
Garlow, Alice.....	Onondaga
Patterson, Mina.....	Tuscarora
Patterson, Ida.....	Tuscarora
Thompson, Hattie.....	Tuscarora
Williams, Irene.....	Tuscarora

*Males**Nationality*

Bissell, Charles.....	Tuscarora
Bissell, Irving.....	Mohawk
Bissell, Joseph.....	Tuscarora
Chew, Nelson.....	Seneca
Hess, Oscar.....	Mohawk
Jones, Nathan.....	Tuscarora
Jones, William.....	Tuscarora
William, Lawrence.....	Mohawk

THIRTY-SECOND ANNUAL REPORT

OF THE

BOARD OF MANAGERS

OF THE

State Custodial Asylum for Feeble-Minded Women

NEWARK, NEW YORK

For the Nine Months Ending June 30, 1916

TRANSMITTED TO THE LEGISLATURE JANUARY 29, 1917

**ALBANY
J. B. LYON COMPANY, PRINTERS
1917**

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STATE CUSTODIAL ASYLUM FOR FEEBLE-MINDED WOMEN

MEMBERS OF THE BOARD OF MANAGERS

Gertrude A. Moss.....	Rochester
Marian P. Burton.....	Rochester
Sarah F. S. Armstrong.....	Penn Yan
Frank L. Waldorf.....	Clyde
Nicholas L. McDonald.....	Newark
Albert W. Beaven.....	Rochester
James A. Randall.....	Syracuse

OFFICERS OF THE BOARD OF MANAGERS

Albert W. Beaven.....	President
James A. Randall.....	Secretary
Nicholas L. McDonald.....	Treasurer

RESIDENT OFFICERS

Dr. Ethan A. Nevin.....	Superintendent
Edwin T. Dunn.....	Steward-Storekeeper
Dr. Anna Warnecke.....	Physician
Gertrude M. Palmer.....	Matron

STATE OF NEW YORK

No. 24

IN SENATE

JANUARY 29, 1917.

Thirty-second Annual Report of the Board of Managers of the State Custodial Asylum for Feeble-Minded Women, Newark, Wayne County, N. Y., for the nine months ending June 30, 1916

To the Honorable, the Legislature of the State of New York:

The Board of Managers of the State Custodial Asylum for Feeble-Minded Women at Newark, New York, respectfully submits herewith its annual report for the nine months ending June 30, 1916, as provided for by law.

Due to the changing of the time for the closing of our annual report, this statement covers but nine months.

The Board of Managers comes to the end of the year, submitting its report with a sense of deepening appreciation of the largeness of its task and the greatness of its responsibility.

On the one hand, we feel more deeply the sadness of the fact that those entrusted to our care have no hope of any cure from the situation in which we find them. But, on the other hand, we have a sense of great satisfaction that we can be the representatives of the State in expressing its growing desire to deal more fairly and kindly with its folk who are in this special place of need.

We again express our ideal that we do not want Newark to be thought of as an institution; we shrink from the thought of people having to live their lives where the actions about them on the

part of those who care for them, are dictated only by professionalism. It is the ambition of the Board of Managers and the Superintendent that it shall be genuinely a home for those who come, and it is our attempt that the entire working force shall keep clear, in all relationships, the attitude of genuine sympathy and personal interest.

To this end it is with a sense of satisfaction that we refer to the growing effort to make life interesting and livable for the women who come under our care. The items of amusement; the endeavor to supply the women with work that will be interesting and will keep their minds engaged and the attempt to associate them in the relationship of play, work and service are all endeavors to make the situation as normal as it can possibly be under the circumstances.

The Board of Managers most heartily concurs with the Superintendent in the different items of his report, particularly in his request for enlargement along many lines. People in our position are constantly impressed with the demand for the kind of service which this home can render. We are convinced that the State must increase its equipment in order to at all adequately take care of the needs of this class of folk.

We regret the unfortunate misunderstanding about the building that has prevented our having the use of our two new buildings — the cottage for 92 inmates and the new hospital building, which would increase our capacity by, approximately, two hundred. Because of this misunderstanding, we shall not be able to use the buildings until the summer season of 1917.

We do not care here to duplicate the report of the Superintendent, but place our emphasis, as does he, upon the need for a build-for women who are delinquent as well as feeble-minded; also we would underscore the application for a field worker. We believe the State is not approaching the problem from the right angle when it spends so much money in custodial work and so little money in preventive work.

Again the Board expresses its attitude of continuous satisfaction with the work of the Superintendent and his assistants; we feel we have a strong force in control of our work.

One change has been made in our Board of Managers. Mrs. Fannie R. Bigelow finished her term of office during the year, and

we record here the splendid part which she had in the work of our Board, bringing to our discussions a wealth of information and social vision that enabled her to make large and intelligent contributions to our discussions. We are greatly pleased with the appointment, by the Governor, of Mrs. Marian Perrin Burton to fill the vacancy. Mrs. Burton's wide experience and humanitarian interest, we believe, will add much to our councils.

That we may properly do our work in the fiscal year 1917-1918, and make provision for doing the work assigned us in a better way we ask the coming Legislature to make the following appropriations:

1. Maintenance	\$181,050 00
2. Two new boilers.	18,000 00
3. Additions and alterations to power plant.	19,650 00
4. New cottage	52,000 00
5. Laundry and equipment.	55,000 00
6. Greenhouse	2,500 00
7. For improving farm land.	1,000 00
8. Fire alarm equipment.	2,500 00
9. Filter and water purification plant.	7,500 00
10. Repairs	15,000 00

We express again our appreciation of the kindly attitude of interest and co-operation on the part of the people of Newark.

We close our report by recording our increased determination to try to make the time which we are investing as members of the Board of Managers of this Institution, pay as large dividends as possible for the welfare of this section of the State's work.

Respectfully submitted,

ALBERT W. BEAVEN,

President.

JAMES A. RANDALL,

Secretary.

NICHOLAS L. McDONALD,

Treasurer.

FRANK L. WALDORF,

GERTRUDE A. MOSS,

SARAH F. S. ARMSTRONG,

MARIAN PERRIN BURTON.

TREASURER'S ANNUAL REPORT

*To the Board of Managers, State Custodial Asylum, Newark,
N. Y.:*

LADIES AND GENTLEMEN.— I herewith submit for your consideration the Treasurer's annual financial statement of general and special fund accounts, at the State Custodial Asylum, Newark, N. Y., for the nine months ending June 30, 1916:

GENERAL FUND

RECEIPTS

Cash on hand October 1, 1915.....	\$4,212 96
Received from Comptroller.....	107,000 00
Received from miscellaneous sales.....	48 42
	<hr/>
	\$111,261 38

DISBURSEMENTS

Salaries and wages.....	\$43,167 04
Provisions	30,186 29
General supplies	3,095 21
Farm and garden.....	997 96
Clothing	4,283 77
Furniture and furnishings.....	2,592 14
Transportation of inmates.....	2 40
Fuel and light.....	15,196 99
Ordinary repairs and shops.....	2,919 38
Medical supplies	591 13
Miscellaneous	3,821 70
Industries	0 00
Lawns, roads, grounds.....	27 95
	<hr/>
	\$106,881 96

Deposited with State Treasurer:

Miscellaneous sales	48 42
	<hr/>
Cash on hand June 30, 1916.....	\$4,331 00

SPECIAL FUND

RECEIPTS

Received from Comptroller:

Hospital "F"	\$30,326 51
One cottage "E".....	31,654 87
Equipment for farm "GG".....	264 20
Addition to boiler house "A".....	90 45
Conduits, sewer mains, etc. "I".....	1,455 77
Employees' building "G".....	643 91
Canal pump intake "H".....	91 00
Boiler house and heating plant.....	242 00

	\$64,468 71

DISBURSEMENTS

1915.

Oct. 4. Hospital	\$3,939 75
Oct. 4. Boiler house and heating plant.....	240 65
Oct. 9. Conduits, sewer mains, etc.....	210 46
Oct. 9. Canal pump intake.....	66 50
Oct. 13. Hospital	1,325 61
Oct. 18. Conduits, sewer mains, etc.....	116 10
Oct. 18. Canal pump intake.....	24 50
Oct. 18. One cottage	5,569 20
Oct. 22. Conduits, sewer mains, etc.....	219 16
Oct. 25. Boiler house and heating plant.....	1 35
Oct. 25. Hospital	10 20
Nov. 2. Conduits, sewer mains, etc.....	79 90
Nov. 2. Hospital	422 53
Nov. 2. One cottage	3,638 85
Nov. 5. One cottage	355 25
Nov. 5. Hospital	4,823 75
Nov. 15. Conduits, sewer mains, etc.....	219 97
Nov. 23. One cottage	1,360 00
Nov. 30. Conduits, sewer mains, etc.....	261 98
Nov. 30. Employees' cottage	507 84
Dec. 6. One cottage	3,047 85
Dec. 6. Hospital	6,115 75
Dec. 21. Conduits, sewer mains, etc.....	77 00
Dec. 22. One cottage	2,465 00

1916.

Jan.	4. Conduits, sewer mains, etc.....	141 20
Jan.	4. One cottage	3,600 35
Jan.	13. Hospital	3,554 70
Jan.	22. One cottage	3,462 05
Feb.	1. Equipment for farm.....	65 00
Feb.	2. Hospital	663 00
Feb.	9. Hospital	2,303 50
Feb.	9. Conduits, sewer mains, etc.....	130 00
Feb.	26. One cottage	1,487 50
March	15. One cottage	2,658 46
March	16. Hospital	2,239 75
March	16. Addition to boiler house.....	36 60
March	27. Hospital	1,839 13
March	27. One cottage	83 63
March	27. Equipment for farm.....	72 50
April	24. One cottage	98 02
April	24. One cottage	1,989 00
April	29. Hospital	769 00
April	29. One cottage	1,825 00
April	29. Hospital	2,019 84
June	1. One cottage	7 25
June	30. Addition to boiler house.....	53 85
June	30. One cottage	7 46
June	30. Equipment for farm.....	126 70
June	30. Employees building	136 07

\$64,468 71

SUMMARY**CLASSIFICATION OF EXPENDITURES FROM GENERAL FUND FOR MAINTENANCE AND ORDINARY REPAIRS**

	Total expense	Per capita	Consumed from products	Per capita
Officers and employees.....	\$43,167 04	\$50 679		
Provisions.....	30,186 29	35.439	\$1,635 34	\$1.919
General supplies.....	3,095 21	3.634	832 82	.906
Farm and garden.....	997 96	1.171		
Clothing.....	4,283 77	5.029	3,274 29	3.844
Furniture and furnishings.....	2,592 14	3.043	1,141 99	1.340
Transportation of inmates.....	2 40	.003		
Fuel and light.....	15,196 99	17.841		
Ordinary repairs.....	2,919 38	3.428		
Medical supplies.....	591 13	.604		
Miscellaneous.....	3,821 70	4.487		
Lawns, roads and grounds.....	27 95	.033		
Total.....	\$106,881 96	\$125.48	\$6,874 44	\$8.07

STATEMENT OF SPECIAL FUNDS JUNE 30, 1916.

	Chapter Laws	Unused appropriation	Unestimated	Unused estimates
Addition to boiler house.....	727 1915	\$61,909 55	\$61,909 55	
Engine for dynamo room.....	727 1915	4,000 00	4,000 00	
Farm barn.....	727 1915	3,500 00	3,500 00	
Extending intake, etc.....	727 1915	935 12	870 12	\$65 00
Canal pump intake.....	728 1915	442 52	2 61	439 91
Conduits, sewer mains, etc.....	728 1915	3,868 42	25 36	3,843 06
Hospital.....	728 1915	16,427 01	8,680 61	7,748 40
One cottage.....	728 1915	13,036 06	4,353 15	9,582 93
Employees' building.....	728 1915	66 63	63 83	2 80
Repairs.....	646 1916	5,000 00	5,000 00	
Filtration and water purification plant.....	646 1916	7,500 00	7,500 00	
Elevated water tank.....	646 1916	10,000 00	10,000 00	
Equipment for cottage for ninety-two inmates.....	646 1916	7,500 00	6,100 37	1,399 63
Equipment for hospital.....	646 1916	7,500 00	6,052 01	1,447 99
Additional laundry equipment.....	646 1916	2,500 00	1,135 00	1,365 00
Equipment for farm.....	646 1916	448 46	256 56	191 90

SPECIAL FUNDS AVAILABLE

Amount	Title, Etc.	Available September 30, 1915	Used	Available June 30, 1916
	CHAPTER 521, LAWS OF 1914			
\$2,000 00	Boiler house and heating plant.....	\$263 81	\$242 00	Lapsed, \$21 81
390 00	Fire escapes, cottages H and I.....	390 00	.....	Lapsed, \$390 00
	CHAPTER 531, LAWS OF 1914			
1,000 00	Equipment for farm.....	712 66	264 20	448 46
	CHAPTER 728, LAWS OF 1915			
30,000 00	Employees' building.....	710 54	643 91	66 63
60,000 00	One cottage.....	45,590 95	31,654 87	13,936 08
60,000 00	Hospital.....	46,453 52	30,026 51	16,427 01
4,000 00	Canal pump intake.....	533 52	91 00	442 52
6,750 00	Conduits, sewer mains, etc.....	5,324 19	1,455 77	3,868 42
	CHAPTER 727, LAWS OF 1915			
62,000 00	Addition to boiler house.....	62,000 00	90 45	61,909 55
4,000 00	Engine for dynamo room.....	4,000 00	.....	4,000 00
3,500 00	Farm barn.....	3,500 00	.....	3,500 00
2,889 55	Extending intake, etc.....	935 12	.....	935 12
	CHAPTER 646, LAWS OF 1916			
5,000 00	Repairs.....	.....	.....	5,000 00
7,500 00	Filter and water purification plant.....	.....	.....	7,500 00
10,000 00	Elevated water tank.....	.....	.....	10,000 00
7,500 00	Equipment for cottage.....	.....	.....	7,500 00
7,500 00	Equipment for hospital.....	.....	.....	7,500 00
2,500 00	Additional laundry equipment.....	.....	.....	2,500 00

ANNUAL REPORT OF THE SUPERINTENDENT

*To the Board of Managers, State Custodial Asylum, Newark,
N. Y.:*

LADIES AND GENTLEMEN.— I take pleasure in submitting this report of the operations of the institution, under your charge, for the nine monthes ending June 30, 1916.

The report covers only a nine months' period because of the change, by the last Legislature, of the date of the beginning of the fiscal year, from October 1st, to July 1st.

On October 1, 1915, our family numbered 852. During the nine months, 23 were admitted; 15 were discharged; and there were five deaths, leaving our number 855 at the close of the nine months, June 30, 1916.

It will be noted that our number of admissions was small. This was due to the fact that our number of deaths and discharges was small. We have no way of providing available beds except as our women pass out of the child bearing period and are removed from the institution as your regulations require, or are removed by death. This does not seem to be understood by the Poor Law officials and others interested in sending women to us. And, we receive frequently rather bitter complaints because they cannot get some person committed. This is due to their not understanding the situation. In an effort to do our best to meet the demand for admission, we have increased our capacity by sixty-five beds, without addition to our buildings, during the last two years.

Of the 23 women admitted, the physical ages were, as follows:

- 1 was 15 years of age
- 2 were 16 years of age
- 2 were 17 years of age
- 4 were 18 years of age
- 1 was 19 years of age
- 4 were 20 years of age
- 3 were 21 years of age
- 2 were 24 years of age
- 1 was 25 years of age

- 1 was 29 years of age
 1 was 30 years of age
 1 was 32 years of age

making the average 20 years. All were below thirty but two; 16 were below 20 years.

The examination on admission showed the mental ages to be:

- 1 with Mental Age of 4 years.
 1 with Mental Age of 6½ years.
 3 with Mental Age of 7 years.
 2 with Mental Age of 9 years.
 5 with Mental Age of 9½ years.
 4 with Mental Age of 10 years.
 1 with Mental Age of 10½ years.
 4 with Mental Age of 11 years.
 1 with Mental Age of 11½ years.
 1 with Mental Age of 12 years.

making the average mental age of those admitted a little over 9 years.

This mental age means that the examination shows them to have the mental capacities of children of the years indicated. This does not mean in the strictly intelligence field only, but in the field of judgment and general reaction to environment.

Of the 23 admissions, nine were committed by the courts.

Of the 15 discharged, nine had passed out of the child bearing period, and were removed by the Superintendents of the Poor of the counties from which they had been sent to our care. Five were transferred to another institution to make room for more urgent cases. One was discharged by a Judge, after a hearing on a writ of habeas corpus.

Of the five deaths, the causes were, as follows:

Pulmonary Tuberculosis	2
Tubercular Peritonitis	1
Tuberculosis of Kidney	1
Shock following a fall	1

A further analysis of the admissions for the nine months shows that five were married and had given birth to three legitimate and

six illegitimate children. The eighteen single women had given birth to ten children, making a total of 19 children.

The question of the relation of syphilis to feeble-mindedness is frequently discussed. So last year, serum from 852 girls was sent to the State Department of Health for the Wasserman reaction. Of the 852, thirty-five were positive, twenty-four doubtful, and 793 negative. In the doubtful cases, a second specimen of serum was sent with the final results, as indicated. Thus we get a 4 per cent positive.

This emphasizes the need of better laboratory equipment and facilities at the institution, that the results may be checked up by examination of the cerebro spinal fluid in each case, and the whole problem of the causative factors of feeble mindedness investigated.

Of the 23 admitted, fourteen had led irregular sexual lives, and for this reason had been brought to the attention of the community. That is, because of their enfeebled mental condition, they became the victims of some supposedly normal minded men in the community. This emphasizes the urgent need of extending to these weak ones the protection of the institution. Not only that they may be protected but that we may prevent other defectives being born. And, that we are getting a larger proportion of these younger women who have been victimized, demonstrates that we are more nearly fulfilling the purpose of the institution.

There is a large number of the mentally defective that should have the care and protection of the State Institutions, and the whole work should be more definitely systematized.

The state should be divided into districts; each district having an institution for all classes of mental defectives. The institution being made up of a central plant for administration, the care of the children and those adults of lower grade needing much care, and the sick. Then there should be a colony for the able bodied adult males where they would produce the milk, butter and coarser vegetables, and a colony for the able-bodied adult women for raising poultry, and general gardening, the whole under one administrative head.

Each institution should have a properly equipped laboratory for investigating not only the cases coming to it, but for making a careful survey of the whole district, cooperating with the educational

departments, the courts and all other social agencies in the district. With proper help, the Medical Inspectors of Schools, under that excellent provision of the education law for the examination of school children, would be enabled to detect the defective children, the potential criminals and law breakers. With the advice and assistance of this laboratory, special classes could be established for all defectives in the district and their progress watched. Then and then only could the rational course for dealing with each individual be pursued. Thus would each institution become a most helpful agency to assist the district in which it was located to solve its many problems of poverty, alcoholism, delinquency and the many other social irregularities.

With the state properly districted and an institution in each district, there should be a central co-ordinating body whose sole work would be dealing with feeble mindedness as a state problem; be this a commissioner, a commission or a bureau of some existing agency. So that the law should specify the competency of its make up.

Our institutional activities have been much the same as in the past. We still feel it our first duty to thoroughly investigate this whole matter. And for this purpose we are asking the legislature to provide us with a First Assistant Physician, to take charge of the laboratory of investigation and an Assistant Physician to act as a Field Worker, assisting the head of the laboratory work, and both co-operating with the Bureau of Analysis and Investigation of the State Board of Charities.

Then we are continuing to make the institution as much like a home as possible, by emphasizing the attention to the individual, by appealing to the best that is in each one, by offering the opportunity for individual development, and by providing as wide a diversity of interests as possible.

Instruction in Domestic Science we carry on as best we can, but that we may improve in these branches, we are asking for an Instructor in Domestic Science.

The Department of Physical Culture continually widens its activities. There were 400 in our classes and 450 interested in out-of-door athletics.

A certain number are interested and helped in the rudimentary studies. There were 100 in our school department last year, in four grades.

Music appeals to our family very much. They enjoy the singing and sing well. There were 150 in the singing classes. These furnished choirs for the Roman Catholic, Protestant and Jewish services.

In our effort to provide diversity of occupation, we have instituted many activities outside the regular domestic occupations, including basketry, rug weaving, chair caning, lace making, embroidery, cement work, and all kinds of fancy sewing, crocheting, etc. One hundred and forty were employed in these special industries.

Much interest is manifested in the care of the lawns and roads, and in the growing of vegetables and flowers. Our Easter Lily display at Easter time, with 500 blooms, was equal to any in this part of the State. And our gardens have furnished fresh vegetables, which added materially to our dietary. One hundred girls were directly employed in the out-of-door occupations. But there is a danger that our work in this direction may be seriously curtailed. Our greenhouse, or propagating house, is very old and practically falling down. In fact, it is in such a bad state of repair that it cannot be repaired. Our request for a new one was ignored last year, but we are again urging a small appropriation for this purpose, that our girls may not be deprived of this privilege. For without a greenhouse, our flower and vegetable work would be practically reduced to nothing.

For our children of a larger growth, much entertainment and amusement is required to keep them contented. The following schedule of special entertainments is but a part of the special things done "to while dull care away."

In addition, there is during the cooler months, dancing on Monday and Thursday evenings.

The entertainments provided by the girls themselves are showing much improvement. The Christmas Cantata, the Minstrel Show and the Easter Service deserve special mention. I doubt whether their excellence could be excelled anywhere.

List of Entertainments

1915.

- Oct. 14. Honor Girls party; about 300 in attendance. Apples and Pop-corn served. Mrs. Wells, Pianist.
 18. Miss Hodge — Musical entertainment.
 Birthday Party.
- Nov. 25. Usual Thanksgiving dinner and church services — Visiting in afternoon.
 29. Minstrel Show from town.
 30. Birthday Party.
- Dec. 25. Mass in the morning; special musical program. 10 a. m.—distribution of gifts; 1 p. m.—usual Christmas dinner. Visitation from cottages 2:30 to 4:30.
 26. Special Protestant Services, with special music — at 3:00 p. m.
 31. Christmas Cantata — “The Search for a King.”
 31. Birthday Party in charge of Miss Palmer (Sleigh Ride)

1916.

- Jan. 1. Catholic Service at 9 a. m.—Choir from town.
 4. Distribution of Badges.
 11. Christmas Play “The Search for a King”—repeated; public invited; about 250 attended.
 21. Honor Party — 325 girls present. Apples and Pop-corn served to all.
 22. Birthday Party.
- Feb. 24. Masquerade for Inmates — (five piece Orchestra.)
 27. Birthday Party.
 All girls went for a Sleigh Ride.
- March 9. Entertainment — Reader, Miss Grace Sage — presented the play “Daddy Long Legs”—very good.
 17. Minstrel Show given by Inmates — 100 taking part.
 30. Entertainment — Ventriloquist.
 Birthday Party — Sleigh Ride.
- April 1. Meeting of Thimble Clubs — Two ladies from town played and sang.
 23. Mass 7:30 a. m.—Special Music.
 23. Protestant Service at 3 p. m.—Special Music.

1916.

- April 23. Easter Dinner — each girl had two eggs.
 25. Easter Cantata — "The Lighted Cross."
 29. April Birthday Party.
- May 10. Thimble Club Walk (309 girls) — each served with
 two sandwiches.
 13. May Birthday Party.
 29. May Day Exercises — 225 in march.
 31. Walk in country for Honor Girls.
 Honor Party (350 Girls).
- June 15. Moving Pictures.
 28. Birthday Party.

That our family is, in a measure, contented, we believe is evidenced in the fact that during the nine months there were but three elopements. These were all returned after a few hours. This, is an institution with unlocked doors, no barred windows, and no boundary fence, gives us, I believe, just cause for encouragement.

The new cottage named "Burnham Cottage" by your Board, in honor of the memory of the Hon. E. K. Burnham, formerly of the Board, is practically completed. This will, we think, accommodate 120 inmates comfortably.

The new hospital, with a capacity of 75, is also practically completed.

Unfortunately, from lack of a proper understanding of the situation, the appropriation of \$12,000 which was to provide boilers for heating these buildings and heaters for furnishing hot water, was vetoed. So their opening will be delayed until after the heating season of 1916-1917.

An appropriation for additions and alterations to the boiler house was obtained. Plans and specifications were prepared by the State Department of Architecture. But so rapid was the advance of prices in materials, that the bids received after the first advertisement were much in excess of the appropriation. This necessitated drastic revision of the plans and the omission of boilers, hot water heater, and many other features absolutely necessary to make the boiler house plant meet the needs of the Institution. Bids were again received and after much delay the contracts

on the revised plans and specifications awarded, and construction is proceeding. But it will be necessary for the next legislature to provide the additional funds requested, to make the boiler house plant equal to our needs.

With appropriations made by the last Legislature, we will be able to erect an Elevated Water Tank and a Filtration Plant, for purifying the soft water supply.

In trying to make over a smaller institution to care for six or eight times the original number contemplated, one must be impressed with the desirability of planning an institution in the beginning to meet the largest demands to be made upon it. This should be definitely considered, especially in the work of providing for the mentally defective.

A summary of our needs in the way of appropriations follows:

Personal service and maintenance..... \$181,050 00

This contemplates an increase in our population by about 200. The new building will be equipped and opened during the closing months of the Fiscal Year, 1916-1917. Our expenditures for the three months ending September 30, 1916, were \$30,945.82, and this is generally estimated as the lightest quarter of the year.

Two boilers \$18,000 00

To complete the necessary equipment at the boiler house, as outlined and recommended by the State Department of Architecture.

Additions and Alterations to Power Plant — including stokers for boilers and new boiler fronts; and connections; completion of 10-inch steam header, etc; circulating pump and motor; extension of domestic hot water mains; removing old boilers, etc \$19,650 00

New Cottage \$52,000 00

This is much needed to care for our defective delinquents. There seems to be no other place in the state provided for this class. It is impossible for us to properly care for them

in our present dormitory buildings, in which there is not one single room. Not only we cannot properly care for them, but they prove a disturbing element to the whole institution. This cottage should form the beginning of a large colony building on the more recently acquired farm land.

Laundry and equipment \$55,000 00

The urgent need for a new laundry is patent to every one who will visit our one larger laundry of antiquated type, in the ironing room of which the mercury registered 110° some days this summer; and the six smaller laundries, three of which are located in basements, and all are poorly ventilated and lighted.

Propagating house (greenhouse) \$2,500 00

Our present greenhouse has rotted down. Without a greenhouse, practically all of our garden and flower work will be at a stand still.

For improving farm property \$1,000 00

We have land that we might cultivate if it were properly drained and brought into a condition for cultivation. This would increase our vegetable production.

Fire alarm equipment \$2,500 00

We have no general fire alarm system at the institution, and I think it is patent to every one that such a system is an urgent need at any institution.

Filter and water purification plant \$7,500 00

Fifteen thousand dollars was authorized last year but only \$7,500 appropriated. We will need this additional amount appropriated this year.

Repairs \$15,000 00

Some of the buildings are old and need extensive repairs that cannot be made from the maintenance fund. Much painting is necessary to keep the buildings in proper condition.

I wish to express my appreciation of the helpful interest of the individual Members of the Board of Managers in the welfare of the institution; also of the assistance rendered by the various State Departments.

The Officers and Employees have been faithful in the discharge of their duties.

Respectfully submitted.

ETHAN A. NEVIN,
Superintendent.

NEWARK, N. Y. October 6, 1916.

MOVEMENT OF POPULATION

Number present October 1, 1915.....	852
Number admitted during last nine months.....	23
Total number cared for.....	875
Number discharged during the year:	
Past age	9
Orders of Superintendents of Poor (To make room for younger women).....	5
Writ of Habeas Corpus.....	1
	15
Number died during the year.....	5
	20
Number present July 1, 1916.....	855
Daily Average Population	851.77
Number of week's board furnished.....	33,219.03
Total expenditure for maintance	\$108,053.21
Weekly per capita cost.....	3.25

Movement of the Population—The representation from the several counties of the State being as follows:

COUNTIES	Number present October 1, 1915	Received during the nine months	Discharged during the nine months	Died during the nine months	Number present July 1, 1916
Albany	14				14
Alleghany	9				9
Broome	7	1			8
Cattaraugus	8				8
Cayuga	9				9
Chautauqua	10				10
Chemung.	16				16
Chenango	3				3
Clinton	4				4
Columbia	9				9
Cortland	4				4
Delaware	4				4
Dutchess	11	1			12
Erie	54	4	8		50
Essex	3				3
Franklin	5				5
Fulton	6	1	1		6
Genesee	3				3
Greene	3				3
Hamilton					
Herkimer	9				9
Jefferson	12				12
Kings	71		1		70
Lewis	4				4
Livingston	4			1	3
Madison	3				3
Monroe	35			1	34
Montgomery	6				6
Nassau	6				6
New York	264	10	3	2	269
Niagara	12				12
Otsego	9				9
Oneida	11			1	10
Onondaga	15	1			16
Ontario	12		1		11
Orange	14	2			16
Orleans	5				5
Oswego	7				7
Putnam	2				2
Queens	9				9
Rensselaer	14				14
Rochmond.	4				4
Rockland	5				5
St. Lawrence	10				10
Saratoga	9				9
Schenectady	9				9
Schuylar	2				2
Schoharie	1				1
Seneca	1				1
Steuben	7				7
Suffolk	9				9
Sullivan	3				3
Tioga	9				9
Tompkins					7
Ulster	13				13
Warren	8				8
Washington	6				6
Wayne	15				15
Westchester	20	1			21
Wyoming	3	1			4
Yates	5	1			6
Totals	852	23	15	5	855

NATIVITY

Austria	15	Connecticut	3
Bohemia	1	District of Columbia	1
Canada	8	Georgia	1
Denmark	2	Illinois	1
England	4	Louisiana	1
France	1	Massachusetts	1
Germany	17	Michigan	1
Hungary	1	New Jersey	10
Ireland	9	New York	597
Italy	4	Ohio	1
New Zealand	1	Panama	1
Norway	1	Pennsylvania	14
North Dakota	1	Vermont	3
Nova Scotia	1	West Virginia	2
Poland	1	United States (State not given)	74
Russia	19	Unknown	53
Scotland	1		
South America	1		
Sweden	2	Total	855
Switzerland	1		

AGES OF THOSE PRESENT AT DATE

15 years	2	30 years	38
16 years	7	31 years	26
17 years	17	32 years	33
18 years	22	33 years	35
19 years	26	34 years	24
20 years	31	35 years	20
21 years	40	36 years	28
22 years	35	37 years	30
23 years	36	38 years	20
24 years	36	39 years	19
25 years	39	40 years	20
26 years	29	41 years	29
27 years	31	42 years	21
28 years	35	43 years	24
29 years	30	44 years	16

AGES OF THOSE PRESENT AT DATE — *Continued*

45 years.....	8	53 years.....	2
46 years.....	11	54 years.....	0
47 years.....	7	55 years.....	0
48 years.....	7	56 years.....	0
49 years.....	6	57 years.....	1
50 years.....	9		—
51 years.....	3		855
52 years.....	2		==

FARM AND GARDEN PRODUCTS

Asparagus, 387½ pounds, at 12 cents.....	\$46 50
Beans, string, 125 pounds, at 2½ cents.....	3 13
Beets, 45 9/10 bushels, at 50 cents.....	22 95
Cabbage, 3471 pounds, at 6 cents.....	20 82
Carrots, 66 41/50 bushels, at 40 cents.....	26 73
Cauliflower, 18 pounds, at 5 cents.....	90
Celery, 177 pounds, at 2½ cents.....	4 43
Celery, 28 pounds, at 5 cents.....	1 40
Chard, Swiss, 1920 pounds, at 2 cents.....	38 40
Chicory, 13 pounds, at 1 cent.....	13
Corn, 38 pounds, at 1 cent.....	38
Cucumbers, 64 pounds, at 2 cents.....	1 28
Lettuce, 153 pounds, at 7 cents.....	10 71
Lettuce, 629 pounds, at 5 cents.....	31 45
Onions, 19 11/19 bushels, at \$1.....	19 58
Onions, Green, 5539 pounds, at 2 cents.....	110 78
Parsnips, 5968 pounds, at 1½ cents.....	89 53
Peppers, 161 pounds, at 5 cents.....	8 05
Radishes, 243 pounds, at 2½ cents.....	6 08
Rhubarb, 2935 pounds, at 2 cents.....	58 70
Salsify, 613 pounds, at 3 cents.....	18 39
Squash, 202 pounds, at 1 cent.....	2 02
Tomatoes, 5798 pounds, at 1 cent.....	57 98
Turnips, 10 bushels, at 60 cents.....	6 00
Total	\$586 32

Lard, 30 pounds, at 11 cents.....	\$3 30
Lard, 194 pounds, at 10 cents.....	19 40
Pork, 1162 pounds at 12 cents.....	139 44
Pork, 6489 pounds, at 10 cents.....	648 90
 Total	 <u>\$811 04</u>

FRUIT PRODUCTS

Apples, 107 1/12 bushels, at 25 cents.....	\$26 77
Apples, 57 3/4 bushels, at 75 cents.....	43 31
Grapes, 122 pounds, at 2 cents.....	2 44
Pears, 15 5/12 bushels, at \$1.....	15 42
Quinces, 46 pounds, at 2 cents.....	92
Strawberries, 977 quarts, at 8 cents.....	78 16
 Total	 <u>\$167 02</u>

HOME PRODUCTS OF CANNED GOODS, ETC.

Fruit, 36 quarts, at 25 cents.....	\$9 00
Mince meat, 570 pounds, at 10 cents.....	57 00
Soap, Sand, 495 pounds, at 3 cents.....	14 85
Soap, soft, 5460 pounds, at 6 cents.....	327 60
Vanilla, 8 gallons, at 62 cents.....	4 96
Wax, floor, 499 pounds, at 16 cents.....	79 84
 Total	 <u>\$493 25</u>

ARTICLES OF CLOTHING MADE IN "A" INDUSTRIAL ROOM FROM
OCTOBER 1, 1915 TO JUNE 30, 1916.

Aprons, bakery	7
Aprons, high neck	35
Aprons, kitchen	47
Aprons, butcher	2
Aprons, fine combing	6
Aprons, Christmas	82
Aprons, laundry	17

Aprons, string	433
Aprons, home supply	29
Aprons, nurse's.....	1
Camisole .. .	1
Caps, bath .. .	105
Caps, employees'	108
Chemise .. .	118
Chemise, burial .. .	3
Coats .. .	17
Collars .. .	67
Cover, dresser .. .	85
Cover, stand .. .	2
Cuffs .. .	50
Costumes, Greek (for entertainment) .. .	4
Curtains, for spray bath .. .	5
Cloth, bread .. .	5
Cloth, meat .. .	2
Drawers, cotton .. .	132
Drawers, canton .. .	205
Drawers, burial .. .	4
Drawers, home supply .. .	3
Dresses .. .	405
Dresses, party .. .	3
Dresses, party, home supply .. .	20
Dresses, home supply .. .	69
Handkerchiefs .. .	1953
Holders .. .	68
Kimono, home supply .. .	1
Night gowns .. .	23
Night gowns, burial .. .	3
Night gowns, home supply .. .	23
Night gowns, hospital .. .	2
Petticoats .. .	2
Petticoats, slips .. .	12
Petticoats, home supply .. .	8
Play suits .. .	11
Pillow cases, employees'	9
Pillow cases, inmates'	406

Pillow ticks	14
Shades, window	46
Sheets, 7/4 brown	554
Skirts, Scotch (for entertainment).....	7
Scarfs, Scotch (for entertainment)	7
Suits, bathing	2
Tea strainers	144
Towels, bath	91
Towels, dish	326
Towels, individual	541
Towels, roller	12
Underwaists	130
Underwaists, home supply	3
Vests	275
Waists for skirts	37

**ARTICLES OF CLOTHING MADE IN "C" INDUSTRIAL ROOM
OCTOBER 1, 1915 TO JUNE 30, 1916**

Aprons, home supply	66
Aprons, private	19
Booties	1043
Bags, broom — old material	1255
Coats, winter	20
Chemise, home supply	79
Chemise, private	13
Collars,	58
Cuffs	50
Cloths, table	30
Cloths, wash (old material).....	65
Cloths, dish (old material)	143
Cloths, tray	25
Covers, dresser	15
Drawers, home supply	84
Drawers, private	27
Dresses, home supply	287
Dresses, private	96
Holders, (old material)	258
Hose,	2352

Kimonos, private	4
Mats, table	15
Napkins, employees	120
Napkins, employees (old material)	38
Napkins, girl's	600
Night gowns, home supply	333
Night gowns, private	52
Pants, home supply	195
Pants, private	6
Petticoats, private	29
Sanitaries (old material)	2120
Sanitary bands (old material)	890
Shields, bed	73
Skirt slips	27
Shawls bound with braid	50
Ticks, mattress	31
Towels, dish (old material)	282
Underwaists, home supply	94
Underwaists, private	3
Vests, home supply	243
Vests, private	1
Waists for skirts	77

SPECIAL

Blouses	7
Coat, relined	1
Dresses, repaired	16
Suits, Christmas play	5
Capes, Christmas play scull	4
Skirt, masquerade	1
Sashes	9
Suits, Indian, for May Day	12
Indian head bands, for May Day	12
Moccasins, Indian, for May Day	24
Skirt slips	3
Suits, drill	32
Belts, drill, new	32
Waists	12

**ARTICLES MADE IN "E" INDUSTRIAL ROOM, OCTOBER 1, 1915
TO JUNE 30, 1916**

Aprons, embroidered	3
Amice cloths, hemstitched.....	2
Baskets	46
Baskets, paper	2
Baskets, reed	3
Bootees, embroidered, pairs.....	2
Bootees, crocheted, pair.....	1
Bead napkin rings.....	27
Bead chains	2
Baby dress, embroidered.....	1
Button holes	13
Bead bags	3
Collars and cuffs, embroidered.....	5
Curtains, drawn work, pairs.....	12
Cushions, embroidered	3
Cushion covers, crocheted.....	2
Caps, crocheted	100
Caps, remade	12
Centerpieces, embroidered	11
Centerpieces, drawnwork	3
Centerpieces, cross-stitched	2
Collars, crocheted	1
Centerpiece, hemstitched	1
Curtain rings and cords, crocheted.....	4
Dresser scarfs, drawnwork	8
Dresser scarf, embroidered.....	2
Dresser scarf, cross-stitch.....	1
Doilies, embroidered	30
Doilies, hemstitched	13
Doilies, cross-stitch	4
Doilies, crocheted	10
Doily, tatting edge	1
Doilies, edge crocheted.....	57
Doilies, drawnwork	6
Dish cloths, knitted	2
Favors	48

Flower holders	6
Handkerchiefs, hemstitched	34
Handkerchiefs, edge crocheted.....	22
Hood, crocheted	1
Jackets, crocheted	2
Jardeniers, reed	3
Lace, crocheted, yards.....	48½
Lunch cloth, drawnwork.....	1
Letters, embroidered	144
Luncheon set, embroidered.....	1
Medallions, crocheted	24
Monograms, embroidered	11
Minnow net, crocheted.....	1
Napkins, hemstitched	12
Napkins, hemmed	36
Needle cases, raffia	6
Negligee cap, crocheted	1
Names, embroidered	5
Night gowns, embroidered.....	6
Pillow cases, hemstitched, pairs.....	2
Pillow cases, embroidered, pairs.....	5
Pillow cases, edge crocheted.....	7
Pillow cases, drawnwork, pairs.....	2
Pillow cover, woven, hand loom.....	2
Paper flowers	95
Play dresses	18
Pin cushions, embroidered.....	34
Pin balls, embroidered.....	2
Pin cushions, crocheted.....	3
Pin cushion, cross-stitch.....	1
Pillow covers, embroidered.....	2
Reed tray	3
Suit underclothes, embroidered.....	1
Sham sheet, embroidered.....	3
Sheets, hemstitched	6
Sheets, hemmed	4
Sheets, embroidered	2
Slippers, crocheted, pairs.....	16

Slippers, knitted, pairs.....	4
Sweet grass bag.....	1
Towels, hemstitched	10
Towels, drawnwork	6
Towels, embroidered	9
Towels, bath, edge crocheted.....	10
Towels, Oriental drawnwork.....	6
Towels, cross-stitch	6
Table mats, sets.....	35
Tatting, yards	12 $\frac{2}{3}$
Table runner, embroidered.....	3
Table cloths, hemmed.....	4
Table cloth, hemstitched.....	1
Tray cloth, hemstitched.....	2
Tray cloth, drawnwork.....	1
Table runner, edge crocheted.....	2
Wrist bracelets, crocheted.....	2
Yokes, crocheted	14

ARTICLES MADE IN "F" INDUSTRIAL ROOM, OCTOBER 1, 1915
TO JUNE 30, 1916

Aprons, light, longsleeves (Ironing Room)	16
Aprons, dark, string	648
Aprons, light, string.....	269
Aprons, dark, highneck	119
Aprons, light, highneck	51
Aprons, denim (new material)	38
Aprons, denim (old material).....	23
Aprons, kitchen, gingham, longsleeve.....	15
Bags, candy	853
Bed shields	79
Bibs, dark, gingham (new material).....	54
Carpet (old material), ft	48
Chairs caned	32
Chairs, leather, upholstered.....	2
Corset covers	4
Coats, relined (new material).....	8
Curtains (oilcloth), dark, prs	12

Diapers (old material).....	42
Dresses, drill	18
Dresses, tarletan (for May Day).....	10
Dress, made over.....	1
Dresses, special (private).....	13
Holders (new material).....	99
Holders (old material).....	67
Jardiniere, cement	17
Mattresses (made over).....	98
Mattresses (new)	90
Mattress (small size), for exhibit.....	1
Mattress ticks (new).....	135
Mattress protectors	41
Pillows, porch (new material).....	2
Pillows, porch (old material).....	1
Pillow ticks (inmates').....	214
Pillow ticks (employees').....	23
Rugs, 1½ yds. long (old material).....	56
Rugs, 1½ yds. long (new material).....	5
Stools, foot, caned (for exhibit).....	2
Sanitaries (old material)	334
Slippers, pairs	10
Skirts, repaired	10
Skirt, made over.....	1
Slips, white	6
Suits, garden, repaired.....	37
Towels, bath	718
Towels, individual	1187
Towels, roller (engineer's shop).....	12
Towels, dish (old material).....	11
Underwaists, new	10

INVENTORY OF THE REAL AND PERSONAL PROPERTY

Building "A" (purchased in 1885) including steam, water and electric fixtures.....	\$36,000 00
Building "B" (erected in 1887) including steam, water and electric fixtures and connecting corri- dors	27,000 00

Building "C" (erected in 1889) including steam, water and electric fixtures and connecting corri- dors	\$27,000 00
Assembly hall (erected in 1890) including corri- dor, cold storage, kitchen, dining rooms and bakery, steam, water and electric fixtures.....	19,000 00
Laundry and corridor (erected in 1889).....	5,000 00
Laundry annex (old boiler house).....	900 00
Power house (erected in 1899) including conduit, steam, electric and water fixtures, boilers, machinery, feed water purifier, fire pump and water heater	78,389 00
Superintendent's residence (remodeled in 1906) and grounds, steam, electric and water fixtures.. .	6,000 00
Ice house (erected in 1899).....	600 00
Cottage "D" (erected in 1895) including conduit, steam, electric and water fixtures.....	14,000 00
Cottage "E" (erected in 1901) including steam, electric and water fixtures.....	30,000 00
Cottage "F" (erected in 1902) including conduit, steam, electric and water fixtures.....	30,000 00
Cottage "G" (erected in 1905) including conduit, steam, electric and water fixtures.....	26,000 00
Cottage "H" (erected in 1907) including conduit, steam, electric and water fixtures.....	26,000 00
Cottage "I" (erected in 1907) including conduit, steam, electric and water fixtures.....	26,000 00
Hospital (erected in 1892) including conduit, steam, electric and water fixtures.....	13,000 00
Barn (erected in 1896) including water and elec- tric fixtures	4,000 00
Pump house, fixtures and spring water supply system (established in 1905, everhauled in 1914, by moving to a site adjacent to power house and establishing an 8-inch line and drainage system	12,000 00
Soft water supply system, including reservoir, filter, fire pump, pump house and pumping apparatus (erected in 1908).....	7,000 00

Valve house (erected in 1908).....	\$800 00
Forty-two acres of land, including N. C. railway branch (various purchases; the earliest in 1885, the latest in 1895).....	14,000 00
Stanley house and lot (purchased in 1886).....	1,500 00
Wilder house and lot (purchased in 1905).....	4,000 00
Fitch farm, 56 acres (purchased in 1913).....	10,000 00
Propagating houses	1,000 00
Piggery (erected in 1904).....	600 00
Carpenter shop	1,000 00
Eight lots in Arcadia cemetery.....	275 00
Employees Building (erected in 1914).....	30,000 00
Burnham cottage (erected in 1916).....	60,000 00
New Hospital (erected in 1916).....	60,000 00
Total	\$571,064 00

CIRCULAR OF INFORMATION

(Corporate Name)

State Custodial Asylum for Feeble Minded Women, Newark,
N. Y.

“The objects of the Asylum are:

“1. The custody and maintenance of feeble-minded women admitted to the Asylum as provided by law and by these by-laws and the rules and regulations of the Institution.

“2. The improvement of the physical, mental, moral and social condition of such inmates.”—From the by-laws.

Location.—The Asylum is located on the New York Central, West Shore and Northern Central railroads; and on the Rochester, Syracuse, and Eastern trolley; thirty miles east of Rochester and fifty miles west of Syracuse. Post-office address, State Custodial Asylum, Newark, Wayne county, New York.

Admission.—Application for admission must be made through the Superintendent of the Poor of the county, or Commissioner of Charities of any city, of which the applicant is a legal resident, and must be made on the blank furnished by the Institution and in accordance with the rules and regulations governing the same. The application should be complete in every detail; all questions

answered; the dates filled in and signed and forwarded to the Superintendent of the Asylum. It will then be referred to the Committee on Applications. But applications must be complete in every part to receive consideration. When applications are accepted by the committee, the Superintendent of the Poor forwarding the same will be notified. The application will be filed and the Superintendent of the Poor will be notified when there is an available vacancy.

Under chapter 361, of the Laws of 1914, feeble-minded women may be committed, after a hearing by a judge of a court of record. Blank forms and particulars may be obtained from any judge of a court of record.

Section 52 of the State Charities Law requires that we admit annually from the various counties and the city of New York in the ratio which the population of such counties and the city of New York, respectively, bears to the population of the State, as ascertained by the last official census. And in the admission of women by either method, we shall adhere strictly to this regulation.

When the Superintendent of the Poor of a county, or Commissioner of Charities of a city, is notified that there is a vacancy for a certain woman, that woman must be brought to the Institution within ten days of the mailing of such notice, or the vacancy will be given to some other applicant. Should the Superintendent of the Poor desire to substitute some other applicant, arrangements for the same must be first made with the Superintendent of the Asylum. Women past the child-bearing period are not admitted.

Maintenance.— The State provides maintenance for all inmates but it is desirable that the relatives and friends furnish what clothing they can. This contributes very much to the contentment of the inmates. But, before anything is sent, inquiry should be made as to what the individual needs.

Correspondence.— All letters relative to the business affairs or to the conditions or needs of the inmates should be addressed to the Superintendent, and the full name of the inmate and full name and address of the writer should always be given.

Inmates are allowed to write once a month, and if the friends cannot, the Institution will furnish the postage. All letters or packages for inmates should be addressed to the Superintendent

and the inmate's full name added, giving the address as Custodial Asylum, Newark, Wayne County, New York. It is especially requested that the friends of inmates shall not write anything likely to make the inmates discontented, such as promises to take them home, regret at their being in the Institution, or in any way making them dissatisfied. All matters should first be referred to the Superintendent, and if it is best for the inmate to be discharged, he will only be too glad to undertake to make the proper arrangements.

It is desirable that one responsible party be selected as the regular correspondent, and if the addressee is changed, that the Institution be notified. Letters concerning inmates are not written except under special conditions, such as serious illness, but all inquiries are cheerfully answered. The friends will be promptly notified of any serious illness, or in event of death.

Visitors.— Our regular visiting day is Friday from 2 to 5 P. M., and it is requested that all visitors arrange to come at that time. General visitors cannot be admitted at other times unless for special reasons. Friends of inmates will be allowed to visit them at other times if they cannot arrange to come on Friday.

Discharge.— When friends or relatives desire to remove an inmate, they should apply to the Superintendent of the Poor of the county, or Commissioner of Charities of the city, from which the person was admitted. He will take the matter up with the Superintendent of the Asylum. Inmates who have passed the child-bearing period must be removed by the Superintendents of the Poor of the counties, or Commissioners of Charities of the cities, from which they were committed.

OFFICERS AND EMPLOYEES

NAME	Occupation	Residence	Date appointed
1 Dr. Ethan A. Nevin.....	Superintendent.....	Newark, N. Y.....	Dec. 17, 1909
2 Belle R. Norton.....	Chief clerk.....	Macedon, N. Y.....	Nov. 1, 1894
3 Anna L. Verdow.....	Stenographer.....	Newark, N. Y.....	Dec. 29, 1913
4 Peter Fagner.....	Coachman.....	Newark, N. Y.....	Oct. 1, 1908
5 Ellsworth F. Beal.....	Night watchman.....	Newark, N. Y.....	Dec. 11, 1911
6 Louise McMahon.....	Cook.....	Newark, N. Y.....	Feb. 15, 1915
7 Edwin T. Dunn.....	Steward-storekeeper.....	Newark, N. Y.....	June 1, 1909
8 Anna S. McLaughlin.....	Bookkeeper.....	Skaneateles, N. Y.....	Nov. 18, 1910
9 Maude C. Miller.....	Clerk.....	Lyons, N. Y.....	April 1, 1910
10 Teresa C. Frey.....	Stenographer.....	Corning, N. Y.....	Jan. 25, 1912
11 Gertrude M. Palmer.....	Matron.....	Ogdensburg, N. Y.....	June 26, 1910
12 Mabel K. Mallory.....	Supervising matron.....	Pembroke, N. Y.....	Oct. 1, 1913
13 Janet Murphy.....	Assistant matron.....	Newark, N. Y.....	Aug. 1, 1912
14 Anna M. Hazeltine.....	Assistant matron.....	East Syracuse, N. Y.....	Oct. 1, 1915
15 Margaret M. Hacemig.....	Assistant matron.....	Lyons, N. Y.....	July 19, 1915
16 Sarah T. Reynolds.....	Assistant matron.....	Lyons, N. Y.....	Aug. 1, 1912
17 Annabell D. S. Glass.....	Assistant matron.....	Scotland.....	Oct. 1, 1915
18 Minnie E. Oakleaf.....	Assistant matron.....	Lyons, N. Y.....	Oct. 1, 1910
19 Helen E. Havens.....	Assistant matron.....	Newark, N. Y.....	July 16, 1915
20 Mary G. Rubery.....	Assistant matron.....	Phelps, N. Y.....	Sept. 1, 1914
21 Augusta M. Barkholdt.....	Assistant matron.....	Lyons, N. Y.....	Oct. 1, 1913
22 Anna Gilligan.....	First attendant, day.....	Penn Yan, N. Y.....	Dec. 14, 1915
23 Mary F. Burns.....	First attendant, day.....	Auburn, N. Y.....	June 16, 1914
24 Genevieve E. Comstock.....	First attendant, day.....	Phelps, N. Y.....	Nov. 13, 1916
25 Alfaretta J. Church.....	First attendant, day.....	Syracuse, N. Y.....	Oct. 3, 1916
26 Doris E. Sutterby.....	First attendant, day.....	Lyons, N. Y.....	April 26, 1915
27 Phoebe L. Lee.....	Attendant, day.....	Newark, N. Y.....	Dec. 4, 1916
28 Esther Dudgeon.....	Attendant, day.....	Constantia, N. Y.....	Dec. 3, 1913
29 Nellie Clark.....	Attendant, day.....	Seneca Falls, N. Y.....	Oct. 19, 1914
30 Helen I. Maring.....	Attendant, day.....	Fairport, N. Y.....	May 15, 1916
31 Madalene B. Tieron.....	Attendant, day.....	Rochester, N. Y.....	Mar. 8, 1915
32 E. Mae Spafford.....	Attendant, day.....	Macedon, N. Y.....	July 1, 1915
33 Jeannie Murray.....	Attendant, day.....	South Lawrence, Mass.....	Aug. 31, 1916
34 Alma LeFevre.....	Attendant, day.....	Newark, N. Y.....	Oct. 16, 1916
35 M. Pearl Van Hooser.....	Attendant, day.....	Dansville, N. Y.....	Mar. 2, 1916
36 Harriet A. Brown.....	Attendant, day.....	Phelps, N. Y.....	Oct. 1, 1915
37 Verna M. Wilber.....	Attendant, day.....	Newark, N. Y.....	Dec. 11, 1916
38 Anna L. Bruce.....	Attendant, day.....	Memphis, N. Y.....	Dec. 12, 1916
39 Eva L. Welch.....	Attendant, day.....	Auburn, N. Y.....	Sept. 2, 1916
40 Helen F. Jewell.....	Attendant, day.....	Syracuse, N. Y.....	Jan. 7, 1916
41 LaVerna R. Van Ryan.....	Attendant, day.....	Newark, N. Y.....	Jan. 2, 1912
42 Ellen Doyle.....	Attendant, day.....	Auburn, N. Y.....	Jan. 11, 1915
43 Nellie Hancock.....	Attendant, day.....	England.....	Mar. 7, 1916
44 Eleanor E. Meigher.....	Attendant, day.....	Red Creek, N. Y.....	Jan. 19, 1915
45 Emma B. Peters.....	Attendant, day.....	Salamanca, N. Y.....	May 16, 1915
46 Mary E. Nolan.....	Attendant, day.....	Clyde, N. Y.....	Sept. 15, 1915
47 Mary M. Kerns.....	Attendant, day.....	Olean, N. Y.....	Nov. 24, 1916
48 Alida L. Glidden.....	Attendant, day.....	Rochester, N. Y.....	April 3, 1916
49 Dora E. Farnsworth.....	Attendant, day.....	East Palmyra.....	Nov. 28, 1916
50 Rose E. Higgs.....	Attendant, day.....	England.....	June 2, 1916
51 Mildred Kitchen.....	Attendant, day.....	Lyons, N. Y.....	July 7, 1916
52 Bessie L. Shoemaker.....	Attendant, day.....	Waverly, N. Y.....	July 26, 1916
53 Clementina Kaubaker.....	Attendant, day.....	Newark, N. Y.....	Oct. 2, 1916
54 Sarah Irwin.....	Attendant, night.....	Newark, N. Y.....	Sept. 1, 1894
55 Mary Harder.....	Attendant, night.....	Newark, N. Y.....	Mar. 17, 1914
56 Martha J. Mooney.....	Attendant, night.....	Rochester, N. Y.....	Dec. 8, 1913

NAME	Occupation	Residence	Date appointed
57 Catherine M. Bush.....	Attendant, night.....	Newark, N. Y.....	April 1, 1915
58 Anna A. Hussey.....	Attendant, night.....	Rochester, N. Y.....	July 3, 1911
59 Nettie A. Clark.....	Attendant, night.....	Clyde, N. Y.....	Aug. 31, 1916
60 Nora E. Coyne.....	Attendant, night.....	Marcellus, N. Y.....	Aug. 3, 1914
61 Estella Beyea.....	Attendant, night.....	Newark, N. Y.....	Aug. 17, 1916
62 Mary C. Monroe.....	Attendant, night.....	Camden, N. Y.....	Jan. 1, 1915
63 Mary Grau.....	Attendant, night.....	Newark, N. Y.....	June 1, 1912
64 Anna Warnecke.....	Physician.....	New York, N. Y.....	Jan. 5, 1902
65 Ines T. L. Tolana.....	Nurse.....	Buffalo, N. Y.....	Sept. 1, 1909
66 Lucy A. Hall.....	Nurse.....	McGraw, N. Y.....	July 24, 1915
67 Grace McNair.....	Cook.....	Rochester, N. Y.....	June 13, 1904
68 F. Emily Washburn.....	Cook.....	Clyde, N. Y.....	Aug. 1, 1912
69 Mary F. Roche.....	Cook.....	Newark, N. Y.....	Mar. 1, 1914
70 Elisabeth Kitchen.....	Cook.....	Lyons, N. Y.....	July 21, 1916
71 Anna Spencer.....	Cook.....	La Salle, N. Y.....	Mar. 18, 1912
72 Anna Shuler.....	Cook.....	Lyons, N. Y.....	Jan. 8, 1914
73 Cors M. Banford.....	Cook.....	Heuvelton, N. Y.....	Aug. 1, 1915
74 Maude P. Wooden.....	Cook.....	Clyde, N. Y.....	July 1, 1916
75 Harriet Wilkinson.....	Cook.....	South Butler, N. Y.....	Oct. 5, 1914
76 Anna McDonnell.....	Baker.....	Buffalo, N. Y.....	May 1, 1902
77 Leland P. Stauring.....	Laborer.....	Newark, N. Y.....	April 23, 1899
78 Evelyn M. Clark.....	Attendant, day.....	Locke, N. Y.....	Jan. 9, 1917
79 Mary M. Hernon.....	Attendant, day.....	Newark, N. Y.....	Jan. 10, 1917
80 Grace A. Woolever.....	Attendant, day.....	Watertown, N. Y.....	Jan. 15, 1917
81 Nora O'Neil.....	Laundress, head.....	Lyons, N. Y.....	Feb. 1, 1903
82 Margaret Ringwood.....	Laundress.....	Newark, N. Y.....	May 9, 1902
83 Mary M. McDonnell.....	Laundress.....	Buffalo, N. Y.....	Aug. 15, 1916
84 Mary Gould.....	Laundress.....	Barnard, N. Y.....	Nov. 1, 1916
85 Eunice S. Kise.....	Laundress.....	Clyde, N. Y.....	Nov. 8, 1916
86 Hannah V. Moore.....	Laundress.....	Oswego, N. Y.....	Sept. 12, 1916
87 Erma Weld.....	Laundress.....	Avoca, N. Y.....	Nov. 25, 1915
88 John Van Vlack.....	Engineer.....	Newark, N. Y.....	Mar. 13, 1906
89 Fred J. Cuyler.....	First assistant engineer.....	Newark, N. Y.....	Mar. 13, 1911
90 John M. Greule.....	Assistant engineer.....	Newark, N. Y.....	Mar. 1, 1913
91 John I. Cuyler.....	Assistant engineer.....	Newark, N. Y.....	Oct. 1, 1913
92 Charles Briesch.....	Fireman.....	Newark, N. Y.....	Mar. 1, 1911
93 Jacob Tellier.....	Firemen.....	Newark, N. Y.....	Mar. 2, 1916
94 William W. Benedict.....	Fireman.....	Newark, N. Y.....	April 1, 1915
95 Henry Bommeline.....	Firemen.....	Newark, N. Y.....	Nov. 1, 1916
96 Will I. Briggs.....	Fireman.....	Newark, N. Y.....	Nov. 1, 1911
97 Joseph E. Drake.....	Carpenter.....	Newark, N. Y.....	Feb. 1, 1915
98 Thomas B. Barnes.....	Foreman.....	Newark, N. Y.....	Jan. 1, 1907
99 Ella E. Kirchhoff.....	Garden Matron.....	Pembroke, N. Y.....	Mar. 1, 1915
100 Claude Burden.....	Laborer.....	Newark, N. Y.....	Mar. 23, 1915
101 John Engels.....	Laborer.....	Newark, N. Y.....	Jan. 5, 1911
102 Jacob Havert.....	Laborer.....	Newark, N. Y.....	Aug. 3, 1910
103 Isaac Havert.....	Laborer.....	Newark, N. Y.....	April 1, 1911
104 Louis Burden.....	Teamster.....	Newark, N. Y.....	June 26, 1916
105 Vesta A. Gilmartin.....	Head teacher.....	Little Genesee, N. Y.....	Oct. 25, 1910
106 Eleanor R. Sanford.....	Instructor in music and physical culture.....	Canandaigua, N. Y.....	June 1, 1913
107 Adah Phillips.....	Instructor in sewing.....	Newark, N. Y.....	Oct. 9, 1904
108 Mary A. Bishop.....	Instructor in sewing.....	Newark, N. Y.....	Aug. 15, 1912
109 Helena Thoms.....	Instructor in sewing.....	Lyons, N. Y.....	May 1, 1907
110 Maud Saunders.....	Attendant.....	England.....	Oct. 1, 1914

STATE OF NEW YORK

No. 25

I N S E N A T E

FEBRUARY 1, 1917

Message from the Governor Urging the Repeal of Chapter 779, Laws of 1911

STATE OF NEW YORK — EXECUTIVE CHAMBER

ALBANY, February 1, 1917.

To the Legislature of the State of New York:

I desire to urge upon your Honorable Bodies the immediate repeal of Chapter 779 of the Laws of 1911 commonly known as the Frawley Boxing Law.

I am satisfied that this law was carefully framed, was passed by the Legislature and approved by the Governor after mature deliberation and consideration; that no better statute can be devised which will permit the giving of boxing bouts as public exhibitions to which an admission fee is asked and received. It was clearly the purpose of the law-makers of the State to permit and, perhaps, encourage, decent and wholesome boxing contests and it was apparently hoped that under the control of a proper Commission this could be accomplished.

I am satisfied, and I believe the members of your Honorable Bodies who are familiar with the events of the last few years have

also become satisfied, that however good the intentions of our law-makers and the members of the Commission may be, the condition is such that public exhibitions of this kind cannot be held within proper limits under this statute, or under any statute which permits fighting or boxing in the presence of miscellaneous audiences which have gained admission thereto by the purchase of tickets.

I am informed and from my own knowledge of the law I believe that some of the exhibitions against which many of the good citizens of this State have properly protested on the ground that they are vulgar, indecent and brutalizing, are not in violation of the law or of the rules perhaps correctly adopted by the Commission under the provisions of the statute.

In the interests of public morals, I deem it my duty to respectfully call the attention of the Legislature to this subject, and to ask for the repeal of this statute.

(Signed) CHARLES S. WHITMAN.

STATE OF NEW YORK

ANNUAL REPORT

OF THE

**Commissioners of the Land
Office**

IN RELATION TO ESCHEATED LANDS

TRANSMITTED TO THE LEGISLATURE FEBRUARY 6, 1917

**ALBANY
J. B. LYON COMPANY, PRINTERS
1917**

STATE OF NEW YORK

No. 26

IN SENATE

FEBRUARY, 6, 1917.

Annual Report of the Commissioners of the Land Office in Relation to Escheated Lands

STATE OF NEW YORK

OFFICE OF THE SECRETARY OF STATE

ALBANY, January 26, 1917

To the Honorable, the Legislature of the State of New York:

The Commissioners of the Land Office respectfully submit to the Legislature a report of their proceedings for the year 1916, relative to petitions presented to them under article 5 of chapter 50 of the Laws of 1909, as amended.

At a meeting of the Commissioners of the Land Office, held at the office of the Secretary of State, at the Capitol, in the City of Albany, on Tuesday, February 1, 1916, at ten o'clock in the forenoon.

Present:

EDWARD SCHOENECK, Lieutenant-Governor.

THADDEUS C. SWEET, Speaker of the Assembly.

FRANCIS M. HUGO, Secretary of State.

EUGENE M. TRAVIS, Comptroller.

JAMES L. WELLS, Treasurer.

EGBURT E. WOODBURY, Attorney-General.

FRANK M. WILLIAMS, State Engineer and Surveyor.

In the matter of the application of Esther B. Howard for the release of certain lands in the village of Honeoye Falls, Monroe county, New York, which escheated upon the death of Amanda Howard, deceased, through failure of heirs, which at a meeting of this Board held December 30, 1915, was reported on by the Attorney-General and referred for appraisal, Mr. Willis C. Ellis reported the value of said property to be \$1,000.00. His expenses in appraising \$2.27.

The report of the Attorney-General above referred to is as follows:

STATE OF NEW YORK

OFFICE OF THE ATTORNEY-GENERAL

ALBANY, December 23, 1915

Before the Commissioners of the Land Office:

In the Matter of the Application of
 ESTHER B. HOWARD for the release
 of certain lands in the village of
 Honeoye Falls, Monroe County, New
 York, which escheated upon the death
 of Amanda Howard, deceased, through
 failure of heirs.

To the Commissioners of the Land Office:

GENTLEMEN.—The petition of Esther B. Howard and corroborative affidavits show that Amanda Howard, a citizen of this State, died in the village of Honeoye Falls on March 12, 1897, intestate and without heirs at law but leaving her husband, George Howard, also a citizen of this State, and leaving real estate which she had acquired by inheritance from her mother, Sally Beecher Supener, consisting of a small lot of land on the northwest side of Church street in said village, on which there was and now is erected a private dwelling house.

Sally Beecher purchased this property in the year 1850 and died seized thereof at Honeoye Falls, N. Y., on January 7, 1888, intestate, leaving no husband her surviving and leaving said

Amanda Beecher Howard, wife of said George Howard, her only heir at law. Sally Beecher Supener died in the house erected on said premises and since her death her daughter, Amanda Howard who was living with her continued in the possession and occupation of the same until her death in 1897 as above stated. Since the death of Amanda Howard said premises continued to be occupied by her husband, George Howard, who paid all taxes thereon and made repairs and improved the property. After the death of Amanda Howard, George Howard married the petitioner, Esther B. Howard, on January 1, 1899. George Howard had a right of courtesy in said property after his wife's death by reason of the fact that two children were born living of said George and Amanda Howard, who have since died in childhood. They had no other children. George Howard died at Pembroke, N. Y., March 30, 1914, leaving the petitioner his widow, but no issue. He left a last will and testament which was duly admitted to probate in the office of the Surrogate of Genesee county on October 13, 1914, by which after certain devises and bequests not affecting the premises in question, he made the petitioner, his widow, Esther B. Howard, his sole residuary devisee and one of the executors of his will. The petition states that all debts, funeral expenses and other charges against the estate of said George Howard have been paid, including bequests made in and by his will.

The pedigree of Sally Beecher is unknown in the neighborhood of Honeoye Falls. She went there when a young woman and was said to have been taken from a charitable public institution. Although efforts have been made to ascertain facts concerning her family history, nothing has been learned. Amanda Beecher, her daughter, was illegitimate, said Sally Beecher being unmarried at the time Amanda was born. No proceedings were ever taken to ascertain the father of Amanda Beecher Howard and who he was is unknown.

The premises sought to be released do not exceed in value one thousand dollars. The notice of this application has been duly advertised for the required period in a newspaper published in Monroe county, copy of which has been posted upon the Monroe County Court House door. No person claims any interest except the petitioner.

The Public Lands Law by section 60 authorizes an application to be made by the surviving husband of the person whose interest escheated. George Howard, the husband, did not make such application. The statute further authorizes an application to be made by a devisee of any person who but for his death, assignment or grant could present such petition. Under section 62 of the Public Lands Law, had the surviving husband, George Howard, applied for a release, and the Land Board had seen fit to grant his application, such release would have been required to have been made without consideration, but the devisee of the surviving husband is not entitled to a release without consideration.

It is, therefore, my opinion that your honorable Board may grant the release to the widow of the surviving husband of the person upon whose death the land escheated, on such terms and conditions as may be just and proper.

Respectfully submitted,

E. E. WOODBURY,

Attorney-General.

The attorney for applicant filed the following statement:

"First: If, as assumed, the applicant has presented such proofs as will justify the granting to her of a release of the premises in question according to the report of the Attorney-General heretofore made herein, it remains to be decided as to what terms and conditions shall be imposed as consideration to the State for the release.

It is also assumed that the release in this case will be granted on such terms and conditions as the Commissioners deems just, following the words of the law. (Public Lands Law, sec. 62.)

Second: In the opinion of the Attorney-General, the applicant does not belong to any class of persons designated by the law governing the case to whom a conveyance 'shall be without consideration.'

Granting that the applicant in this case is not strictly entitled to the benefit of the mandatory provision above quoted, it is respectfully submitted that in view of the facts and circumstances of the case, the peculiar relation which the applicant sustains as widow, sole residuary devisee and successor in law to the person

(George Howard) husband of the last owner of the lands, who but for his death could have asked for a release without payment of consideration, and no other person being interested or having an equal right, and no objection being made, the case is one where justice to all persons, and to the State, will be met by a liberal construction of the law governing.

It is also submitted that the law does not in express terms prohibit the granting of a release without consideration to an applicant not within the class of persons to whom the words 'shall be without consideration,' apply. The limitation would seem to be prohibitory only for the benefit of a class of persons, while it leaves all others to the tender mercies of the Court where the property sought to be released does not exceed \$1,000.00. It seems to be discretionary with the Commissioners to say that a consideration of more than nominal amount be paid in a case like this, and as to the amount of the same.

The value of the property does not exceed \$1,000.00.

It is assessed for \$750.00 including a 30-foot front by 5 rods deep lot adjoining belonging to the applicant and which contains all the fruit, well, and lawn space appurtenant to the 40-foot front lot of the same (5 rods) depth in question.

The petition and affidavits show that the dwelling house on the original lot was constructed and maintained always by George Howard, the husband of the applicant in this case.

This proceeding will of necessity require the payment by the petitioner of considerable sums for expenses and attorney's fees.

The 'equity' of the State would seem to be hardly such as to require the imposition of more than a very small purchase price if it might so be called, upon the applicant if she is granted a release.

Under the '6th' statement of facts in the petition in this matter there are set forth some 'special facts and circumstances by which it is claimed that such interest (that of the State) should be released to the petitioner; as suggested by subdivision 7 of section 62 of the Public Lands Law, and I refer to the same as further reasons for the extension of a liberal allowance to the petitioner in determining what consideration she should pay to the State.

Third: If the reasons for requiring a release to be made in cases of a 'surviving husband' of the person whose lands escheated, without consideration are to be found in the facts and circumstances of the particular case, it is respectfully submitted that same reasons will be found applicable to this case of a surviving widow of a surviving husband.

I do not know of any basis for calculating what sum if any the applicant might justly pay for a release in this case. Her means are quite limited and therefore any considerable sum to be paid by her added to her necessary expenses incurred in the proceeding would embarrass her somewhat.

Wherefore it is requested that your Honorable Board may name such terms as a consideration for the release, if granted, as may seem proper and just, and within your official authority."

After discussion it was ordered, upon payment of \$252.27 on account of grant and one dollar patent fee, that quit-claim letters-patent issue to Esther B. Howard for the lands applied for.

In accordance with above action letters-patent issued at follows:

The people of the State of New York, by the grace of God, free and independent: To all to whom these presents shall come, greeting: Know ye, that we have granted, released and quit-claimed, and by these presents do grant, release and quit-claim unto Esther B. Howard, residing at Pembroke, Genesee county, New York, the premises hereinafter described, the said Esther B. Howard having duly made and presented a petition to the Commissioners of the Land Office within the time and in the form and manner required by article 5 of chapter 50 of the laws of 1909, and the amendments thereto, to which reference is hereby made, and the said Commissioners having in accordance with said acts duly considered the allegations contained in said petition and having found the facts therein set forth to be established by competent and satisfactory proof: and the payment of two hundred fifty-two dollars and twenty-seven cents on account of grant, which amount has been received and this day paid into the State Treasury, and the payment of one dollar patent fee, we have granted, released and quit-claimed and by these presents do grant, release and quit-claim unto Esther B. Howard, her heirs and assigns, all the right, title and interest of the people of the State of New York, in and to the premises described as follows:

All that tract or parcel of land situate in the village of Honeoye Falls, in the town of Mendon, in the county of Monroe and State of New York, bounded and described as follows: Beginning at the southeast corner of lands conveyed by Adams Miller to Horace W. Passmore and now owned by Martin Burrows; thence westerly along the south line of said Burrows land five rods; thence southerly parallel with the highway forty feet; thence easterly and parallel with the first mentioned line five rods to the line of the highway, thence northerly along the line of the highway forty feet to the place of beginning.

These letters-patent are issued pursuant to a resolution of the Commissioners of the Land Office adopted February 1, 1916.

Together with all and singular the rights, hereditaments and appurtenances to the same belonging or in any wise appertaining, excepting and reserving to ourselves, all gold and silver mines; to have and hold the above described and quit-claimed premises unto the said Esther B. Howard, her heirs and assigns forever; and these presents shall in no wise operate as a warranty of title.

IN TESTIMONY WHEREOF, We have caused these Letters to be made Patent, and the Great Seal of our said State to be hereunto affixed:

[L. s.] Witness Francis M. Hugo, Secretary of State of our said State, at our city of Albany, the ninth day of February in the year of our Lord one thousand nine hundred sixteen.

FRANCIS M. HUGO.

Passed the Secretary's office, the 9th day of February, 1916.

A. B. PARKER,

Deputy Secretary of State.

At a meeting of the Commissioners of the Land Office, held at the office of the Secretary of State, on Wednesday, the 29th day of March, 1916, at 2:30 o'clock in the afternoon.

Present:

EDWARD SCHOENECK, Lieutenant-Governor.

THADDEUS C. SWEET, Speaker of the Assembly.

FRANCIS M. HUGO, Secretary of State.

EUGENE M. TRAVIS, Comptroller.

JAMES L. WELLS, Treasurer.

EBURT E. WOODBURY, Attorney-General.

May Bogart Conklin applied for release of the State's interest in certain escheat property in the town of Rye, Westchester county, which escheated to the State on the death of her husband, George Edward Grover.

The Attorney-General reported thereon as follows:

STATE OF NEW YORK

OFFICE OF THE ATTORNEY-GENERAL

ALBANY, March 29, 1916

Before the Commissioners of the Land Office:

In the Matter of the Application of **MAY BOGART CONKLIN** to the Commissioners of the Land Office for the release of the interest escheated to the State in lands located in the village of Mamaroneck, Westchester county, N. Y., upon the death of her husband, George Edward Grover, without heirs.

To the Commissioners of the Land Office:

GENTLEMEN.—The petition and additional papers filed herewith show that George Edward Grover purchased from William H. Gedney and wife, by warranty deed, dated December 30, 1893, recorded in Westchester county, Register's office, a lot of land in the village of Mamaroneck, town of Rye, in said county, known as Lot No. 14 on map of William H. Gedney property

fronting 75 feet on River avenue and on each side between 139 and 140 feet.

Satisfactory proof has been furnished to me that said George Edward Grover married the petitioner, then known as Mary Bogart, in the village of Mamaroneck on December 26, 1891. The aforesaid premises were mortgaged by George Edward Grover and Mary, his wife, in 1894 and again in 1903, by mortgages which have since been cancelled of record. The last of said mortgages, being one for \$1,200 to the Provident Savings Loan Investment Co., was discharged September 17, 1907, by the petitioner after her husband's death. George Edward Grover died intestate March 28, 1906, without heirs, but leaving the petitioner, his widow. The petitioner alleges that since her husband's death she has not only paid off the balance of \$1,000 of said \$1,200 mortgage, but has also paid the taxes on said property and has kept said property in repair for upwards of nine years, and that said house and lot is the only home the petitioner has; a notice of this application was duly advertised in a newspaper published in Westchester county, and a copy thereof was duly posted on the Court House door.

The application is made in accordance with the statute and the rules and regulations of the Commissioners of the Land Office.

The said premises which are now free and clear from all incumbrances, are said to be of the value of \$3,000. If your Honorable Board see fit to grant the prayer of this petition, they have ample power to do so and in that case, the grant should be made without consideration in pursuance of the statutes.

Respectfully submitted,

E. E. WOODBURY,

Attorney-General.

On motion, the above report was adopted and it was ordered, that quit-claim letters-patent issue to May Bogart Conklin for the lands applied for, upon payment of one dollar patent fee.

In accordance with above action letters-patent issued as follows:

The people of the State of New York, by the grace of God, free and independent: To all to whom these presents shall come, greeting: Know ye, that we have granted, released and quit-claimed, and by these presents do grant, release and quit-claim

unto May Bogart Conklin, residing on River street, in the village of Mamaroneck, town of Rye, county of Westchester and State of New York, the premises hereinafter described, the said May Bogart Conklin having duly made and presented a petition to the Commissioners of the Land Office within the time and in the form and manner required by article 5 of chapter 50 of the laws of 1909, and the amendments thereto, to which reference is hereby made, and the said Commissioners having in accordance with said acts duly considered the allegations contained in said petition and having found the facts therein set forth to be established by competent and satisfactory proof; and upon the payment of one dollar patent fee, we have granted, released and quit-claimed and by these presents do grant, release and quit-claim unto May Bogart Conklin, her heirs and assigns, all the right, title and interest of the people of the State of New York, in and to the premises described as follows:

All that certain lot, piece or parcel of land, situate, lying and being in the town of Rye, county of Westchester and State of New York, and known and designated by the number fourteen on a certain map entitled, "Map of lots in the Town of Rye, Westchester County, N. Y., property of William H. Gedney," surveyed June 18, 1883, by W. H. Disbrow, Civil Engineer and Surveyor, and bounded and described from said map as follows:

Beginning at a point on the easterly side of a street laid out on said map and which is now called River avenue and at the northwesterly corner of the lot about to be conveyed and at the southwesterly corner of lot number sixteen as laid down on said map; thence running easterly along the southerly line of said lot number sixteen, one hundred thirty-nine and forty-one one-hundredths feet; thence running south seventeen degrees twenty-five minutes east, seventy-five feet to the northeasterly corner of lot number twelve as laid down on said map; thence running westerly along the northerly line of said lot number twelve, one hundred thirty-nine and seventy-three one-hundredths feet; to the easterly line of said River avenue; thence running north seventeen degrees ten minutes west, along the easterly side of said avenue, seventy five feet to the point or place of beginning.

These letters-patent are issued pursuant to a resolution of the Commissioners of the Land Office adopted March 29, 1916.

Together with all and singular the rights, hereditaments and appurtenances to the same belonging or in any wise appertaining, excepting and reserving to ourselves, all gold and silver mines; to have and hold the above described and quit-claimed premises unto the said May Bogart Conklin, her heirs and assigns forever: and these presents shall in no wise operate as a warranty of title.

IN TESTIMONY WHEREOF, We have caused these Letters to be made Patent, and the Great Seal of our said State to be hereunto affixed:

[L. S.] Witness Francis M. Hugo, Secretary of State of our said State, at our city of Albany, the fourth day of April in the year of our Lord one thousand nine hundred sixteen.

FRANCIS M. HUGO.

Passed the Secretary's office, the 4th day of April, 1916.

A. B. PARKER,

Deputy Secretary of State.

Henry F. Wallace applied for release of the State's interest in certain escheat property in the city of Oswego, which escheated to the State upon the death of Jane B. Wallace, deceased.

The Attorney-General reported thereon as follows:

STATE OF NEW YORK

OFFICE OF THE ATTORNEY-GENERAL

ALBANY, March 29, 1916

Before the Commissioners of the Land Office:

In the Matter of the Application of
HENRY F. WALLACE for the release of
the State's interest in certain lands in
the city of Oswego, which escheated on
the death of his wife, Jane B. Wallace
without heirs.

To the Commissioners of the Land Office:

GENTLEMEN.—The accompanying papers show that Jane B. Wallace purchased subdivision No. 6 of Lot 109 of Military Lot

No. 6, Van Buren Tract, in the city of Oswego, Oswego county, being 51 feet wide on Dublin street and 130 feet deep, consisting of the dwelling house and lot known as No. 31 Dublin street in the city of Oswego, by deed from Anne Ferguson, dated July 5, 1912, recorded April 17, 1913, in Oswego County Clerk's Office. Jane B. Wallace died October 3, 1915, at the St. Lawrence State Hospital, Ogdensburg, N. Y., seized of said premises which are stated to be of the value of \$2,500. She died intestate and left no heirs. She left surviving, however, her husband, Henry F. Wallace, the petitioner, to whom she was married at Putnam, Conn., on October 6, 1869. Said Jane B. Wallace and petitioner have lived together as husband and wife since the time of said marriage, until about two months prior to decedent's death, at which time she was committed to said hospital by reason of mental incapacity under an order of the Oswego county judge in lunacy proceedings. No children were ever born of said marriage.

The petitioner alleges that the said property was purchased in the name of his deceased wife, Jane B. Wallace, with funds realized from the sale of property formerly owned by him in the city of Buffalo and that the petitioner after purchasing the property made alterations and considerable repairs thereon at his own personal expense; that he has paid from his own resources all the expenses incidental to the commission of his deceased wife to the State hospital, the expenses of her maintenance there and her funeral expenses and notice of this application was duly advertised in a newspaper published in the city of Oswego for three consecutive weeks commencing December 21, 1915, and a copy of said notice has been posted in various public places in the city of Oswego.

The application is in accordance with the statute and the rules and regulations of the Land Office, and as the petitioner is the surviving husband of decedent, if your Honorable Board decides to grant this application, it must be without consideration in accordance with the terms of the statute.

Respectfully submitted.

E. E. WOODBURY,

Attorney-General.

On motion, the above report was adopted and it was ordered, that quit-claim letters-patent issue to Henry F. Wallace upon payment of one dollar patent fee.

In accordance with above action letters-patent issued as follows:

The people of the State of New York, by the grace of God, free and independent: To all to whom these presents shall come, greeting: Know ye, that we have granted, released and quit-claimed, and by these presents do grant, release and quit-claim unto Henry F. Wallace, residing at No. 34 West Ninth street, in the city of Oswego, county of Oswego, State of New York, the premises hereinafter described, the said Henry F. Wallace having duly made and presented a petition to the Commissioners of the Land Office within the time and in the form and manner required by article 5 of chapter 50 of the Laws of 1909, and the amendments thereto, to which reference is hereby made, and the said Commissioners having in accordance with said acts duly considered the allegations contained in said petition and having found the facts therein set forth to be established by competent and satisfactory proof; and upon the payment of one dollar patent fee, we have granted, released and quit-claimed and by these presents do grant, release and quit-claim unto Henry F. Wallace, his heirs and assigns, all the right, title and interest of the people of the State of New York, in and to the premises described as follows:

All that tract or parcel of land, situate in the city of Oswego, county of Oswego and State of New York, known and described as follows: Subdivision number Six of lot number One hundred nine of Military Lot number Six, the Van Buren Tract, so called, as the same is laid down on a map of said lot filed in the clerk's office of the county of Oswego, by George Deming, being fifty-one feet wide on Dublin street and one hundred thirty feet deep. Said property consists of a dwelling house and lot known as No. 31 Dublin street in said city of Oswego, which was conveyed to Jane B. Wallace by Anne Ferguson by deed dated July 5, 1912, recorded in the Oswego county clerk's office April 17, 1913, in book 285, of Deeds at page 410.

These letters-patent are issued pursuant to a resolution of the Commissioners of the Land Office adopted March 29, 1916.

Together with all and singular the rights, hereditaments and appurtenances to the same belonging or in any wise appertaining, excepting and reserving to ourselves, all gold and silver mines, to have and hold the above described and quit-claimed premises unto the said Henry F. Wallace, his heirs and assigns forever; and these presents shall in no wise operate as a warranty of title.

IN TESTIMONY WHEREOF, We have caused these Letters to be made Patent, and the Great Seal of our said State to be hereunto affixed:
[L. S.] Witness Francis M. Hugo, Secretary of State of our said State, at our city of Albany, the third day of April in the year of our Lord one thousand nine hundred sixteen.

FRANCIS M. HUGO.

Passed the Secretary's office, the 3rd day of April, 1916.

A. B. PARKER,

Deputy Secretary of State.

At a meeting of the Commissioners of the Land Office, held at the office of the Secretary of State, in the city of Albany, New York, on Thursday, April 27, 1916, at 2:30 o'clock in the afternoon.

Present:

THADDEUS C. SWEET, *Speaker of the Assembly.*

FRANCIS M. HUGO, *Secretary of State.*

EGBERT E. WOODBURY, *Attorney-General.*

FRANK M. WILLIAMS, *State Engineer and Surveyor.*

Henry Wilson applied for a release of the State's interest in lands in the town of Greenburgh, Westchester county, and Hempstead, Nassau county, New York.

The Attorney-General reported thereon as follows:

STATE OF NEW YORK

OFFICE OF THE ATTORNEY-GENERAL

ALBANY, April 9, 1916

Before the Commissioners of the Land Office:

In the Matter of the Application of
HENRY WILSON for a release of certain
parcels of land in the Town of Green-
burgh, Westchester County, and Val-
ley Stream, Nassau County, which
escheated upon the death of his wife,
Eliza Wilson, without heirs.

To the Commissioners of the Land Office:

GENTLEMEN.—The petition herein and corroborative affidavits and other papers show that on April 12, 1893, Eliza Wilson purchased from the Elmsford Improvement Company Lots 9, 10, 11, 12, 13, 14, 30 and 32 in Block 15 on map of building lots and villa sites at Elmsford Park, Westchester county, made by Ward Carpenter & Son, engineers, May 5, 1891, and that on June 14, 1895, said Eliza Wilson purchased of the Royal Land Company of New York Lots 457 and 458 at Valley Stream, Queens (now Nassau) county, on map 3 of Irma Park property of said Royal Land Company.

The applicant alleges that said lands were paid for by himself from his earnings and were not paid for by any money belonging to said Eliza Wilson, but title was taken in her name in order that, should applicant die before his wife, she would be saved the expense of administration upon his estate. Applicant has resided upon the lands in Elmsford, Westchester county, ever since the purchase thereof and erected a dwelling house thereon and has paid all taxes imposed upon both properties. The said Eliza Wilson died intestate March 1, 1905, from a sudden paralytic stroke, and was thus prevented from making her will during her last illness. She left no heirs-at-law either in this country or in England, where she was born.

The real estate in Westchester county is said to be of the value of three thousand dollars, and the lots in Nassau county are unimproved and said to be worth five hundred dollars. The application is made in accordance with the provisions of the statutes and the rules and regulations of the Commissioners of the Land Office. I am of the opinion that should your honorable body see fit to grant the prayer of this petition the same should be made without consideration as provided by the statute.

Respectfully submitted,

E. E. WOODBURY,

Attorney-General.

On motion, the above report was adopted and it was ordered upon payment of ten dollars patent fee that quit-claim letters-patent issue to Henry Wilson for the lands applied for.

In accordance with above action letters-patent issued as follows:

The people of the State of New York, by the grace of God, free and independent: To all to whom these presents shall come, greeting: Know ye, that we have granted, released and quit-claimed, and by these presents do grant, release and quit-claim unto Henry Wilson, residing in the village of Elmsford, town of Greenburgh, Westchester county, New York, the premises herein-after described, the said Henry Wilson having duly made and presented a petition to the Commissioners of the Land Office within the time and in the form and manner required by article 5 of chapter 50 of the Laws of 1909, and the amendments thereto, to which reference is hereby made, and the said Commissioners having in accordance with said acts duly considered the allegations contained in said petition and having found the facts therein set forth to be established by competent and satisfactory proof; and upon the payment of ten dollars patent fee, we have granted, released and quit-claimed and by these presents do grant, release and quit-claim unto Henry Wilson, his heirs and assigns, all the right, title and interest of the people of the State of New York, in and to the premises described as follows:

All those eight certain lots, pieces or parcels of land situate at Elmsford in the town of Greenburgh, county of Westchester and State of New York, shown and designated on a certain map of

building lots and villa sites at Elmsford Park, Westchester county, New York, made by Ward Carpenter & Son, civil engineers, Tarrytown, New York, May 5, 1891, and filed as map number ten hundred thirty-one in the office of the Register of the county of Westchester and State of New York, on the 19th day of July, 1892, as lots number Nine, Ten, Eleven, Twelve, Thirteen, Fourteen, Thirty and Thirty-two in block Fifteen on said map.

Also, all those certain lots, pieces or parcels of land situate, lying and being at Valley Stream, in the county of Nassau and State of New York, known and designated by the lot numbers Four hundred fifty-seven and Four hundred fifty-eight in block Seventeen on a map entitled: "Map number 3 of Irma Park property of the Royal Land Company of New York," and filed in the office of the clerk of Queens county; the easterly line of said lots extending to and bordering on the westerly line of Bismark street.

These letters-patent are issued pursuant to a resolution of the Commissioners of the Land Office adopted April 27, 1916.

Together with all and singular the right, hereditaments and appurtenances to the same belonging or in any wise appertaining, excepting and reserving to ourselves, all gold and silver mines; to have and hold the above described and quit-claimed premises unto the said Henry Wilson, his heirs and assigns forever; and these presents shall in no wise operate as a warranty of title.

IN TESTIMONY WHEREOF, We have caused these Letters to be made Patent, and the Great Seal of our said State to be hereunto affixed:

[L. S.] Witness Francis M. Hugo, Secretary of State of our said State, at our city of Albany, the third day of May in the year of our Lord one thousand nine hundred sixteen.

FRANCIS M. HUGO.

Passed the Secretary's office, the 3rd day of May, 1916.

A. B. PARKER,
Deputy Secretary of State.

At a meeting of the Commissioners of the Land Office, held at the office of the Secretary of State in the city of Albany, on Thursday, June 29, 1916, at two-thirty o'clock in the afternoon.

Present:

EDWARD SCHOENECK, *Lieutenant-Governor.*

FRANCIS M. HUGO, *Secretary of State.*

EUGENE M. TRAVIS, *Comptroller.*

JAMES L. WELLS, *Treasurer.*

EBGBURT E. WOODBURY, *Attorney-General.*

FRANK M. WILLIAMS, *State Engineer and Surveyor.*

Charles Riley applied for a release of the State's interest in premises known as No. 82 Hopkins avenue, Long Island City, Queens county, N. Y., which escheated to the State upon the death of his stepmother, Fannie Riley.

The Attorney-General reported thereon as follows:

STATE OF NEW YORK

OFFICE OF THE ATTORNEY-GENERAL

ALBANY, May 16, 1916

Before the Commissioners of the Land Office:

In the Matter of the Petition of CHARLES
RILEY for a release of the State's inter-
est in premises known as No. 82 Hop-
kins Avenue, Long Island City,
Queens County, which escheated to the
State upon the death of his stepmother,
Fannie Riley.

To the Commissioners of the Land Office:

GENTLEMEN.—The petition herein and corroborative affidavits and abstract of title show that Fannie Riley purchased Lot No. 338 on map of property at Ravenswood in the vicinity of Hallock's Cove, L. I., on the west side of Jay street (now Hopkins ave.), in 1883. At that time she was the wife of Thomas Riley, the father of the petitioner, his mother having previously died,

and said Fannie Riley being his stepmother. The said premises are said to have been purchased with funds belonging to petitioner's father. Fannie Riley died intestate in February, 1890, at Long Island City, leaving no known heirs, but leaving her said husband her surviving, and seized of said premises which are said to be of the value of \$1,500. Thomas Riley, the husband of Fannie Riley, died intestate in Long Island City in or about the year 1899, leaving the petitioner, his son and only heir, the petitioner claiming as the only heir-at-law of his father, the husband of said Fannie Riley, and by reason of over twenty years' possession, erected a substantial building on said premises in the belief that he had a valid title thereto. He has also paid many years' taxes and assessments upon the said premises.

The petitioner also claims that he is equitably entitled to said property by reason of an instrument in writing signed by Fannie Riley and endorsed on the original deed to her, whereby she assigned and transferred to Charles Riley, the petitioner, all her right, title and interest in said premises. The assignment was not, however, duly acknowledged, although a notary public's name was attached to said transfer. The petitioner is now advised by his counsel that said assignment is void because of defects of form and execution and therefore prays that the Commissioners of the Land Office will release to him the State's interest in the said lands.

Section 62 of the Public Lands Law provides that the Commissioners may release the State's interest in a case of this kind and that a conveyance so made to any petitioner who is the heir-at-law of a surviving husband, shall be without consideration when the value of the property sought to be released does not exceed \$10,000.

The petitioner further shows that the premises in question are all the land that Fannie Riley died seized of.

Your honorable body have full power to grant the relief prayed for in the petition.

Respectfully submitted,

E. E. WOODBURY,

Attorney-General.

On motion the above report was adopted and it was ordered upon payment of one dollar patent fee that quit-claim letters-patent issue to Charles Riley for the premises applied for.

In accordance with above action letters-patent issued as follows:

The people of the State of New York, by the grace of God, free and independent: To all to whom these presents shall come, greeting: Know ye, that we have granted, released and quit-claimed, and by these presents do grant, release and quit-claim unto Charles Riley, residing at number 82 Hopkins avenue, Long Island City, in the county of Queens and State of New York, the premises hereinafter described, the said Charles Riley having duly made and presented a petition to the Commissioners of the Land Office within the time and in the form and manner required by article 5 of chapter 50 of the Laws of 1909, and the amendments thereto, to which reference is hereby made, and the said Commissioners having in accordance with said acts duly considered the allegations contained in said petition and having found the facts therein set forth to be established by competent and satisfactory proof; and upon the payment of one dollar patent fee, we have granted, released and quit-claimed and by these presents do grant, release and quit-claim unto Charles Riley, his heirs and assigns, all the right, title and interest of the people of the State of New York, in and to the premises described as follows:

All that certain lot, piece or parcel of land, situate, lying and being in Long Island City, county of Queens and State of New York, and known and distinguished on a map made by William H. Elphinstone, Surveyor, which map is entitled "Map of Property at Ravenswood in the vicinity of Hallett's Cove, Long Island," and is filed in the office of the Clerk of Queens county, as follows: Lot number three hundred thirty-eight on said map and being on the westerly side of Jay street and bounded as follows: On the north by lot three hundred thirty-seven on said map, on the east by Jay street aforesaid, on the south by lot three hundred thirty-nine on said map and on the west by lot three hundred thirty-four on said map.

These letters-patent are issued pursuant to a resolution of the Commissioners of the Land Office adopted June 29, 1916.

Together with all and singular the rights, hereditaments and appurtenances to the same belonging or in any wise appertaining,

excepting and reserving to ourselves, all gold and silver mines; to have and hold the above described and quit-claimed premises unto the said Charles Riley, his heirs and assigns forever; and these presents shall in no wise operate as a warranty of title.

[L. S.]

IN TESTIMONY WHEREOF, We have caused these Letters to be made Patent, and the Great Seal of our said State to be hereunto affixed:
WITNESS Francis M. Hugo, Secretary of State of our said State, at our city of Albany, the eighteenth day of July in the year of our Lord one thousand nine hundred sixteen.

FRANCIS M. HUGO.

Passed the Secretary's office, the 18th day of July 1916.

C. W. TAFT,

Second Deputy Secretary of State.

At a meeting of the Commissioners of the Land Office, held at the office of the Secretary of State, in the city of Albany, on Thursday, the twenty-fourth day of August, 1916, at 2:30 o'clock in the afternoon.

Present:

FRANCIS M. HUGO, *Secretary of State.*

JAMES L. WELLS, *Treasurer.*

EBERT E. WOODBURY, *Attorney-General.*

FRANK M. WILLIAMS, *State Engineer and Surveyor.*

Anna Augusta Mitchell applied for a release of the State's interest in a lot on the east side of Franklin street in the village of Hempstead, Nassau county, N. Y., which escheated to State on the death of her husband, George Mitchell, deceased.

The Attorney-General reported thereon as follows:

STATE OF NEW YORK

OFFICE OF THE ATTORNEY-GENERAL

ALBANY, August 18, 1916.

Before the Commissioners of the Land Office:

In the Matter of the Application of
ANNA AUGUSTA MITCHELL, for the
release of certain escheated lands in the
village of Hempstead, Nassau county,
New York.

To the Commissioners of the Land Office:

GENTLEMEN.—The petition of the above-named applicant shows that she is over 75 years of age, and is the widow of George Mitchell, one of the last surviving members of the Shinnecock Indians, who died April 7, 1913, intestate, aged 91 years, a resident of the village of Hempstead, and the owner in fee of a lot of land in said village, lying on the east side of Franklin street, described in said petition, being 25 feet in front and rear, and about 129 feet deep on the north side and about 137 feet deep on the south side, upon which is erected a shack, now occupied by the petitioner; that the petitioner was married to said George Mitchell in 1857, in the village of Hempstead, and that said Mitchell on his death left no heirs-at-law or kindred of any kind.

The said George Mitchell was an itinerant watch and clock repairer, and the land above described was purchased with the savings of many years, saved by the petitioner and her husband, and is the only property her husband was possessed of at the time of his death. The petitioner is old and feeble and unable to obtain employment, but hopes to maintain herself during the remaining years of her life from the proceeds of the sale of said lands above described, should the Land Board see fit to release the same to her.

The said premises are a part of premises purchased by George Mitchell in the year 1866, he having conveyed the rear part of his lot to one Anna Augusta Clowes in 1868. The said premises are said to be of the value of \$600.

The application appears to be in accordance with the provisions of the statutes and the rules and regulations of the Land Board. Should your Honorable Body see fit to grant the prayer of the petitioner, the release should be without consideration, in accordance with the provisions of the statute.

Respectfully submitted,

E. E. WOODBURY,

Attorney-General.

On motion, the above report was adopted and it was ordered, upon payment of one dollar patent fee that quit-claim letters-patent issue to Anna Augusta Mitchell for the lands applied for.

In accordance with above action letters-patent issued as follows:

The people of the State of New York, by the grace of God, free and independent: To all to whom these presents shall come, greeting: Know ye, that we have granted, released and quit-claimed, and by these presents, do grant, release and quit claim unto Anna Augusta Mitchell, residing on the easterly side of Franklin street, below Front street, in the village of Hempstead, town of Hempstead, county of Nassau, State of New York, the premises hereinafter described, the said Anna Augusta Mitchell having duly made and presented a petition to the Commissioners of the Land Office within the time and in the form and manner required by article 5 of chapter 50 of the Laws of 1909 and the amendments thereto, to which reference is hereby made, and the said Commissioners having in accordance with said acts duly considered the allegations contained in said petition and having found the facts therein set forth to be established by competent and satisfactory proof; and upon payment of one dollar patent fee, we have granted, released and quit-claimed, and by these presents do grant, release and quit-claim unto Anna Augusta Mitchell, her heirs and assigns, all the right, title and interest of the people of the State of New York, in and to the premises described as follows:

All that certain piece, parcel or lot of land situate, lying, being in the village of Hempstead, county of Nassau, State of New York, on the east side of Franklin street, bounded on the north by land of William Brooks, on the east by land formerly of George Mitchell, and now or late of Ann Augusta Clowes, on the south by land of Gideon S. Nichols, on the west by Franklin

street, and being twenty-five feet in front and rear, and about one hundred and twenty-nine feet deep on the north side and about one hundred and thirty-seven feet deep on the south side.

These letters-patent are issued pursuant to a resolution of the Commissioners of the Land Office adopted August 24, 1916.

Together with all and singular the rights, hereditaments and appurtenances to the same belonging or in any wise appertaining, excepting and reserving to ourselves, all gold and silver mines; to have and hold the above described and quit-claimed premises unto the said Anna Augusta Mitchell, her heirs and assigns forever; and these presents shall in no wise operate as a warranty of title.

IN TESTIMONY WHEREOF, We have caused these our Letters to be made Patent, and the Great Seal of our said State to be hereunto affixed:

[L. S.]

WITNESS Francis M. Hugo, Secretary of State of our said State, at our city of Albany, the twenty-eighth day of August in the year of our Lord one thousand nine hundred sixteen.

FRANCIS M. HUGO.

Passed the Secretary's office, the 28th day of August, 1916.

C. W. TAFT,

Second Deputy Secretary of State.

At a meeting of the Commissioners of the Land Office, held at the office of the Secretary of State, in the city of Albany, on Thursday, the twenty-fourth day of August, 1916, at 2:30 o'clock in the afternoon.

Present:

FRANCIS M. HUGO, *Secretary of State.*

JAMES L. WELLS, *Treasurer.*

EGBERT E. WOODBURY, *Attorney-General.*

FRANK M. WILLIAMS, *State Engineer and Surveyor.*

The Secretary of State presiding.

Emma Nehlsen applied, under chapter 419, Laws of 1916 for a release of the State's interest in a lot in the former town of Newtown, Queens county, which escheated to the State.

The Attorney-General reported thereon as follows:

STATE OF NEW YORK

OFFICE OF THE ATTORNEY-GENERAL

Before the Commissioners of the Land Office:

In the Matter of the Application of
EMMA NEHLSEN, under Chapter 419
of the Laws of 1916, for the release
of a lot of land in the former town of
Newtown, Queens County, alleged to
have escheated to the State.

To the Commissioners of the Land Office:

GENTLEMEN.—On December 1; 1913, Emma Nehlsen applied to the Land Board for the release of a lot of land 21 feet front and 120 feet deep on which is erected a one-story frame house of four rooms said to be worth not to exceed \$1,200, which lands escheated to the State on the death of Dorothea Ehrmann on July 8, 1872, intestate and without heirs. The report of Honorable Thomas Carmody, Attorney-General, to the Land Board under date of January 30, 1914, states that said application alleged that Dorothea Ehrmann died in Newtown, Queens county, N. Y., on July 8, 1872, intestate leaving no known heirs-at-law and that she was at her death the owner in fee of said land in the said town by purchase from John A. Meehan and wife under a deed dated May 20, 1868, that said decedent left a husband who subsequently remarried and had a child, Joseph Ehrmann, by his second wife and that the petitioner purchased the lot in question in 1909 from Joseph Ehrmann, the son and heir-at-law of Andreas Ehrmann, deceased, and that he had advised the attorney for the petitioner that in his opinion the Land Board had no power to release the lands in question for the reason that the petition was not presented within forty years after such escheat as provided under section 60 of the Public Lands Law and that the petitioner's attorney, coinciding with this view, desired that the application should be considered as withdrawn, and at a meeting of the Land Board held February 24, 1914, said report was adopted.

and the application was ordered withdrawn. Since this time, chapter 419 of the Laws of 1916 was passed authorizing the Commissioners of the Land Office to release to Emma Nehlsen all the right, title and interest of the people of the State of New York in and to said lot upon such terms and conditions as to them shall seem just and proper, whereupon a new application was filed by this petitioner on July 8, 1916, setting forth the same facts contained in the former petition. In addition to the facts set forth in the report of Attorney-General Carmody, it has been shown that Dorothea Ehrmann purchased the said property in 1868 with money which was furnished by her husband, Andreas Ehrmann, and after the purchase of said lot Andreas Ehrmann, in the year 1870, erected the present dwelling house thereon, a photograph of which accompanies the present application.

It further appears that Andreas Ehrmann died on or about April 15, 1884, leaving his last will and testament wherein he assumed to devise said premises to his second wife, Regina, who died intestate on June 30, 1907, leaving said Joseph Ehrmann her only heir-at-law, said Joseph being the only issue of the marriage of said Andreas Ehrmann and Regina, his second wife, and that on March 22, 1909, the petitioner, Emma Nehlsen, believing said Joseph Ehrmann to be the owner in fee of said premises purchased the same from him, paying \$1,000 and receiving his deed, which was duly recorded in Queens county clerk's office.

She further shows in her petition that the actual possession of said premises since May 20, 1868, was in Dorothea Ehrmann down to the date of her death in 1872, and from July 8, 1872, in Andreas Ehrmann down to the date of his death on April 15, 1884, and in Regina Ehrmann from April 15, 1884, down to the time of her death on June 30, 1907, and in Joseph Ehrmann from June 30, 1907, to the date of his conveyance to the petitioner, March 22, 1909, and from that time has been in the petitioner and during said period from 1868 up to the same time there has been no adverse claim in any person whatsoever.

In view of this adverse possession against the State for over forty years, and in view of the provision of section 362 of the Code of Civil Procedure which provides that the people of the State will not sue a person for or with respect to real property or the issue or profits thereof by reason of the right or title of the

people of the State to the same unless the cause of action accrued within forty years before the action is commenced or the people or those from whom they claim have received the rents and profits of the real estate or some part thereof within the same period, it would seem that the State would have difficulty to recover possession of said premises in an action of replevin under section 1977 of the Code.

It appears that Mrs. Nehlsen desired to procure a loan on said premises but was unable to procure the same because of the technical escheat of the State in 1872. This application is made in accordance with the statute and the rules and regulations of the Land Board except that the rule of the Land Board requiring an advertisement of the notice of the present application to the Land Board has not been made. However, Mrs. Nehlsen did advertise for the required period in the year 1913 at the time of her first application and as she now in her petition asks that the Board waive the publication of the notice of application in order to save her this expense, I would recommend the waiver of the rule requiring publication.

I am of the opinion that the Land Board has full power to grant the prayer of the petition and release the lands described in the petition to the petitioner without consideration.

Respectfully submitted,

E. E. WOODBURY,

Attorney-General.

On motion, the above report was adopted and it was ordered upon payment of one dollar patent fee that quit-claim letters-patent issue to Emma Nehlsen for the lands applied for.

In accordance with above action letters-patent issued as follows:

The people of the State of New York, by the grace of God, free and independent: To all to whom these presents shall come, greeting: Know ye, that we have granted, released and quit-claimed and by these presents do grant, release and quit-claim unto Emma Nehlsen, residing at No. 22 Bergen avenue, Evergreen, in the borough of Queens, in the city of New York, county of Queens and State of New York, pursuant to the provisions of chapter 419 of the Laws of 1916, the premises hereinafter described, the said Emma Nehlsen having duly made and pre-

sented a petition to the Commissioners of the Land Office in the form and manner required by article 5 of chapter 50 of the Laws of 1909 and the amendments thereto, to which reference is hereby made, and the said Commissioners having in accordance with said acts duly considered the allegations contained in said petition and having found the facts therein set forth to be established by competent and satisfactory proof; and upon the payment of one dollar patent fee, we have granted, released and quit-claimed and by these presents do grant, release and quit-claim unto Emma Nehlsen, her heirs and assigns, all the right, title and interest of the people of the State of New York, in and to the premises described as follows:

All that certain lot, piece or parcel of land, with the buildings and improvements thereon, situate, lying and being in the borough of Queens, in the city of New York, county of Queens and State of New York, which is known and designated on a certain map filed in the office of the clerk of the county of Queens, entitled "Map of South Williamsburg in Newtown, belonging to William Taylor, surveyed, laid out and drawn by Thomas W. Field, as and by the lot number seventeen.

These letters-patent are issued pursuant to a resolution of the Commissioners of the Land Office adopted August 24, 1916.

Together with all and singular the rights, hereditaments and appurtenances to the same belonging or in any wise appertaining, excepting and reserving to ourselves, all gold and silver mines; to have and hold and above described and quit-claimed premises unto the said Emma Nehlsen, her heirs and assigns forever; and these presents shall in no wise operate as a warranty of title.

IN TESTIMONY WHEREOF, We have caused these Letters to be made Patent, and the Great Seal of our said State to be hereunto affixed:

[L. S.]

WITNESS Francis M. Hugo, Secretary of State of our said State, at our city of Albany, the twenty-eighth day of August in the year of our Lord one thousand nine hundred sixteen.

FRANCIS M. HUGO.

Passed the Secretary's office, the 28th day of August 1916.

C. W. TAFT,

Second Deputy Secretary of State.

Caroline Coffey applied for a release of the State's interest in a strip of land on the north side of West 24th street, between Ninth and Tenth avenues in the city of New York, which escheated to the State on the death of Hugh Coffey, deceased.

The Attorney-General reported thereon as follows:

STATE OF NEW YORK

OFFICE OF THE ATTORNEY-GENERAL

ALBANY, August 18, 1916.

Before the Commissioners of the Land Office:

In the Matter of the Application of
CAROLINE COFFEY to the Commissioners of the Land Office for the
release of the State's interest in a narrow strip of land on the north side of
West 24th street, east of 10th Avenue
in the City of New York, alleged to
have escheated to the State.

To the Commissioners of the Land office:

GENTLEMEN.—The verified petition herein and other proofs show that the petitioner is seventy-three years of age and is the widow of Hugh Coffey, to whom she was married in December, 1863, in the city of New York; that her said husband, Hugh Coffey, was a native of Ireland and came to this country prior to 1850 and was soon afterward duly naturalized; that in March, 1865, he purchased from George Warner the premises known as 445 West 24th street, in the city of New York, where the petitioner has resided continuously for upwards of forty years, until very recently.

In the deed to the petitioner's husband the said premises were described as being parts of lots numbers 77 and 78 on map of estate of T. B. Clark, beginning at a point on the north side of 24th street, 245 feet and 10 inches east of 10th avenue; thence easterly 22 feet and 10 inches by 98 feet and 9 inches deep; that petitioner's husband continued to hold the title to said premises until 1873, when, becoming enfeebled in health, he expressed a

desire to convey said premises to the petitioner, his wife, who had contributed to the purchase price thereof, and for that purpose employed attorneys, now deceased, to prepare deed of said premises to convey title to her; that through inadvertence the starting point of said deeds was incorrectly stated at 255 feet and 10 inches instead of 245 feet and 10 inches, leaving a difference of 10 feet; that petitioner's attention was only called to this error recently when she placed her premises in the market for sale, although she has been in full possession during all these years of the premises beginning 245 feet and 10 inches east of 10th avenue.

She further shows that her husband did not own any interest in any other premises on 24th street, but that the deed to her inadvertently overlaps the lot of an adjoining owner on the east side who has good title thereto.

Hugh Coffey died in the city of New York, May 3, 1881, intestate and without issue. He left, however, besides the petitioner, a brother, Robert Coffey, who came to this country from Ireland and was naturalized in 1855, and died November 3, 1875, intestate, a widower, leaving one daughter, Elizabeth, his only heir at law, who subsequently married one Rufus Lisk. Elizabeth Lisk, by deed dated September 5, 1912, quit-claimed all her interest in this ten foot strip to the petitioner.

The petitioner's husband, Hugh Coffey, had also another remaining brother, named Andrew Coffey, who always resided in Ireland, and was a non-resident alien. He died there in 1881, having never filed his intention to become an American citizen. He died intestate, leaving him surviving his widow, Martha, and five children, all of whom still reside in Ireland, with the exception of one son, Robert James Coffey, who emigrated to Canada, and all of said five children have been at all times non-resident aliens. Robert James Coffey died in Canada in December, 1912, leaving a widow and three infant children all residing in Canada. The widow and all of the heirs at law of Andrew Coffey, excepting said Robert James Coffey, quit-claimed their interest in said premises to the petitioner by deed dated October 22, 1912.

The petitioner is advised by counsel (and I think correctly) that Elizabeth Lisk, as the only child of Robert Coffey, deceased, legally inherited an undivided one-half interest in said ten foot

strip, but as Andrew Coffey, the other brother is a non-resident alien, his children could not inherit from him, and upon the death of said Andrew Coffey, said Andrew's undivided one-half interest in said ten foot strip passed by escheat to the State.

The petitioner has paid all the taxes upon said premises, and has kept the same in repair since 1874.

The present market value of the whole of the premises 445 West 24th street, is about \$13,000, and the undivided one-half interest in said ten foot strip does not exceed the amount of \$2,120, subject to the petitioner's right of dower therein, which would be at the rate of \$624 per front foot. The petitioner says she has no property or income outside of said premises.

Technically there appears to have been an escheat to the State of an undivided one-half of the westerly ten feet of the house and lot, No. 445 West 24th street, but evidently it was the intention of the petitioner's husband to convey the said premises to her, and the error in the deed was evidently an error on the part of the scrivener only, and it is very questionable whether the State could dispossess the petitioner as to said ten feet, under said technical escheat. The escheat, however, did not occur on the death of her husband, but by reason of the fact that her husband's brother, Andrew, was and remained a non-resident alien, and died such.

Therefore, if your honorable body see fit to grant the prayer of the petition, I think \$1.00 consideration should be paid.

Respectfully submitted,

E. E. WOODBURY,

Attorney-General.

On motion, the above report was adopted, and it was ordered upon payment of one dollar consideration, and one dollar patent fee, that quit-claim letters-patent issue to Caroline Coffey for the lands applied for.

In accordance with above action letters-patent issued as follows:

The people of the State of New York, by the grace of God, free and independent: To all to whom these presents shall come, greeting: Know ye, that we have granted, released and quit-claimed, and by these presents do grant, release and quit-claim unto Caroline Coffey, residing at No. 35 Vanderbeck Place, in Hackensack, New Jersey, widow of Hugh Coffey, deceased, the

• premises hereinafter described, the said Caroline Coffey having duly made and presented a petition to the Commissioners of the Land Office within the time and in the form and manner required by article 5 of chapter 50 of the Laws of 1909, and the amendments thereto, to which reference is hereby made, and the said Commissioners having in accordance with said acts duly considered the allegations contained in said petition and having found the facts therein set forth to be established by competent and satisfactory proof; and the payment of one dollar on account of grant, which amount has this day been paid into the State Treasury, and the payment of one dollar patent fee, we have granted, released and quit-claimed and by these presents do grant, release and quit-claim unto Caroline Coffey, her heirs and assigns, all the right, title and interest of the people of the State of New York, in and to the premises described as follows:

All that certain lot of land, situate, lying and being in the Sixteenth ward of the city of New York, on the northerly side of Twenty-fourth street between the Ninth and Tenth avenues, and being parts of two certain lots, known and distinguished on a "Map of the Estate of T. B. Clarke, made by A. Corning and U. W. Freeman, 10th of January, 1816," on file in the Register's office in and for the city and county of New York and numbered 235, the said two lots being known by the numbers 77 (seventy-seven) and 78 (seventy-eight) and the premises hereby conveyed being bounded and described as follows, viz:

Beginning at a point on the northerly side of Twenty-fourth street, distant easterly from the northeast corner of the Tenth avenue and Twenty-fourth street, two hundred forty-five feet and ten inches, and running thence eastwardly along the northerly side of Twenty-fourth street, twenty feet and ten inches; thence northerly at right angles to Twenty-fourth street and parallel with the Tenth avenue, ninety-eight feet and nine inches more or less, to the centre line of the block; thence westerly along the said centre line, twenty feet and ten inches and thence southerly, ninety-eight feet and nine inches more or less to the place of beginning.

These letters-patent are issued pursuant to a resolution of the Commissioners of the Land Office adopted August 24, 1916.

Together with all and singular the rights, hereditaments and

appurtenances to the same belonging or in any wise appertaining, excepting and reserving to ourselves, all gold and silver mines; to have and hold the above described and quit-claimed premises unto the said Caroline Coffey, her heirs and assigns forever; and these presents shall in no wise operate as a warranty of title.

IN TESTIMONY WHEREOF, we have caused these our Letters to be made Patent, and the Great Seal of our said State to be hereunto affixed:
[L. s.] Witness Francis M. Hugo, Secretary of State of our said State, at our city of Albany, the fifteenth day of September in the year of our Lord one thousand nine hundred sixteen.

FRANCIS M. HUGO.

Passed the Secretary's Office, the 15th day of September, 1916.

C. W. TAFT,
Second Deputy Secretary of State.

Respectfully submitted,
EDWARD SCHOENECK,
Lieutenant-Governor.

T. C. SWEET,
Speaker of the Assembly.

FRANCIS M. HUGO,
Secretary of State.

EUGENE M. TRAVIS,
Comptroller.

JAMES L. WELLS.
Treasurer.

FRANK M. WILLIAMS,
State Engineer and Surveyor.

Commissioners of the Land Office.

STATE OF NEW YORK

No. 27

IN SENATE

FEBRUARY 13, 1917

Preliminary Report of the Joint Legislative Committee to Investigate the Moving Picture Industry

To the Senate and Assembly of the State of New York:

By concurrent resolution of the Senate and Assembly duly adopted January 3, 1917, a joint committee of the Senate and Assembly, consisting of three members of the Senate, to be appointed by the President of the Senate, and five members of the Assembly, to be appointed by the Speaker of the Assembly, was created to investigate whether the moving picture industry is a proper subject of State taxation, and if such committee so deem, the kind and amount of taxes to be imposed, which such joint resolution authorized the members of such committee to choose a chairman and "to sit within and without the city of Albany, to subpoena and compel the attendance of witnesses, to require the production of books, records and papers, to take and hear proof and testimony, and otherwise have all the powers of a legislative committee as provided by the Legislative Law, including the adoption of rules for the conduct of its proceedings."

Such concurrent resolution required such committee to report the result of its investigation to the Legislature on or before February 15, 1917. Such committee was thereupon duly appointed,

and when appointed, duly met and chose a chairman and selected counsel. The Committee met in the city of New York on the 18th day of January, 1917, at eleven o'clock A. M., in Parlor "O" of the Murray Hill Hotel, and proceeded with the work for which it was created, since which time it has been and still is conducting hearings at such place, stenographic reports of which hearings are being made and kept.

At the first of such meetings of the committee, the motion picture industry was represented, and before any evidence was taken or proceedings had by the committee, counsel for those connected with the motion picture industry objected to the jurisdiction of the committee in the following language:

"We feel that the inquiry is of such a character as to be beyond the jurisdiction and power of this committee to maintain. We feel that it involves a judicial inquiry, a judicial determination as to whether or not this industry is the appropriate subject of taxation, and as such that the Legislature has exceeded its authority entirely in constituting this committee for the purpose of holding these hearings, and that the committee itself is without any power or jurisdiction in the premises."

At the outset, your committee stated to those representing the motion picture industry, and has at all times during its proceedings, maintained the position that it desired all persons interested in the inquiry and in the industry to voluntarily aid and assist the committee in the discharge of its duties, and in such a way as not to make it necessary for the committee to exercise the powers which your bodies have vested in it to compel the attendance of and the giving of testimony by witnesses through the use of subpoenas or by compulsion. Your committee is glad to report that many engaged in the motion picture industry have met the desires and wishes of the committee in this respect, but there are some notable cases in which that has not been and is not the attitude of those interested in the business, as a result of which the labors of the committee in the performance of its work have been increased and retarded, and to such an extent that your committee has been unable, within the time fixed by such concurrent resolution, to

complete the work for which it was created and so as to require extension of the life of such committee.

In its final report the committee will submit the names of the persons and concerns who have and who will have rendered aid to the committee in the way of voluntarily furnishing such data and information as the committee has asked them for.

On January 28, 1917, the committee caused to be mailed in securely enclosed post-paid wrappers, sixty-nine letters signed by the chairman of this committee, addressed to persons, firms and corporations who were engaged in one or more of the so-called branches of the motion picture industry, and who, as disclosed by the evidence and by data which the committee had gathered, were in a position to furnish information necessary to enable the committee to reach a conclusion as to whether or not such industry is a proper subject for taxation, a copy of which letter, marked Exhibit A, is attached to and is made a part of this report. Accompanying each of such letters was a list of forty-six questions which the committee had prepared calling for certain specific facts and data bearing upon the question at issue, a copy of which list of questions, marked Exhibit B, is hereto attached and made a part hereof.

Among the persons, firms and corporations to whom such letter was addressed and mailed, and to which a list of such questions was so sent, was the "Metro Pictures Corporation," of which Richard A. Rowland is the president, and Joseph W. Engel is the treasurer, and which corporation has its main office for the transaction of its business at 1476 Broadway, in the city of New York, and in which city the said Rowland resides. Said Metro Pictures Corporation is engaged in the manufacture or production, through allied or associated or subsidiary companies, and in the distribution of motion or photoplay pictures throughout the United States, Canada and other parts of the world, and in fact is one of the large corporations engaged in that business. The committee also ascertained and the fact is that one, J. Robert Rubin, an attorney at law of the city of New York, is the secretary of said corporation and also its attorney and general counsel. This committee, not having received the answers to such questions from the Metro Pictures Corporation, caused the president of said corporation, to wit, Richard A. Rowland, to be communicated

with before the session of said committee on the 31st day of January, 1917, and the presence of said Rowland at the afternoon session of the committee on said last mentioned day was requested, and the said Rowland was also requested to bring and have with him at that time the answers of the Metro Pictures Corporation to such questions. At the afternoon session of the committee on said January 31, 1917, the said Rowland appeared in person, and with the attorney and general counsel for said Metro Pictures Corporation, to wit, said J. Robert Rubin, whereupon said Richard A. Rowland was called as a witness by the committee, and having first been duly sworn by the chairman of the committee as a witness, was examined at some length by the counsel to this committee. During such examination the said Richard A. Rowland was asked this question:

“The Chairman of the Committee, Mr. Wheeler, mailed or caused to be mailed last Saturday to different concerns interested in the motion picture industry, a letter accompanied by, I think, forty-six printed questions. Did your concern receive one of those letters with a list of the questions?”

To which the said Rowland answered, “Yes, sir.” The said Rowland was thereupon asked this question:

“Has your concern, the Metro Pictures Company, answered those questions?”

To which such Rowland answered,

“I gave the paper to the auditor to fill out yesterday and told him to send it in, and I think he complied and answered the questions last night. I don’t know whether it was mailed then or not.”

Whereupon, said Rubin stated to the committee:

“It has not been mailed yet.”

The answers to such questions were not received by this committee until February 8, 1917, more than a week after Mr. Rowland gave the testimony above quoted. Many of such answers when received were incomplete, inaccurate, and some of them untruthful, as appears by the testimony given by said Rowland before

the committee on his examination hereinbefore referred to. Upon such facts appearing, this committee caused to be issued a subpoena duly signed by its chairman, addressed to said Joseph W. Engel, and delivered it, together with a duplicate thereof, to an experienced process server in the city of New York, one Robert S. McLellan, who has had many years' experience in that business, and instructed him to make service thereof upon said Joseph W. Engel, all of which was done on the 8th day of February, 1917, which said subpoena, with proof of due, timely and personal service thereof on the said Joseph W. Engel at the office of the Metro Pictures Corporation in the city of New York, on the 8th day of February, 1917, is hereto attached, marked Exhibit C, and is made a part of this report.

Said Joseph W. Engel did not appear before said committee on the 9th day of February, 1917, nor has he appeared before said committee at any time, nor did he communicate in any way with said committee nor the chairman thereof, nor the counsel thereof, except by letter received by the chairman after the adjournment of the afternoon session of the committee on February 9th, 1917, which was several hours after his name had been called by the chairman of the committee at the morning and afternoon session, and in the presence of newspaper men and other persons who were present at the meeting of such committee, and after the chairman of the committee had announced that the report of the failure of said Engel to obey or respect the subpoena of the committee would be made to the Legislature of the State of New York. Attached hereto and made part hereof is a copy of the letter which was received by the chairman of the committee from said Joseph W. Engel after the adjournment of the meeting of the committee on February 9th, which said letter the chairman of the committee found in his mail box in the office of the Murray Hill Hotel, where the meetings were that day held, and where the chairman of said committee was staying, but which said letter had not gone through the mails, but had evidently been left by some messenger or other person at the office of the hotel, after four o'clock P. M., without any attempt having been made to see or reach the chairman of the committee or its counsel. Not only are the statements contained in the letter of said Engel flatly contradicted by the said affidavit

of Robert S. McLellan, but said Engel must have known that said process server had no right to waive or change the terms of the written subpoena, which commanded the said Engel to be and appear as a witness before said committee at its session at eleven o'clock on February 9, 1917.

In this connection, this committee calls attention to the fact that it has been well known by newspaper press reports and by announcement of the committee at its sessions, that the hearings of the committee in New York would not be had earlier than Wednesday of each week, and that it was the custom of the committee to adjourn on Friday afternoon of each week until the following Wednesday. And it has also been well known to everyone interested in the matter, including the attorney and general counsel for as well as other officials of the Metro Pictures Corporation, that the life of this committee would expire on the 15th day of February, 1917, unless its life was extended by action of the Legislature of the State of New York, and it has been currently rumored and reported to this committee by different ones that some of the people connected with the motion picture industry have been saying that the life of the committee would not be extended. It has evidently been the purpose of some of the persons connected with the motion picture industry to put off complying with the request of the committee for information and the furnishing of data and answers to questions until such time as would enable them to escape furnishing such information because of the expiration of the life of this committee, hoping thereby to make it impossible for the committee to obtain such proper and necessary information.

In addition to this flagrant case, there are two other cases where witnesses who have been called before the committee have declined to answer proper questions put to them, both by the chairman of and counsel to the committee, but in those instances such witnesses have requested that the matter be held in abeyance until they could consult with their respective boards of directors and obtain permission from such boards to give the information called for, promising that they would advise the committee on the action of the board of directors at or before the next session of the committee; which is appointed to be held on Wednesday, the 14th day of February, 1917, at eleven o'clock A. M.

The committee also report that in another case it had received assurance that a man prominently connected with and well posted on the motion picture industry would voluntarily appear before the committee when requested and give the committee the benefit of his information and knowledge. When so requested to appear, such person refused to do it, whereupon and on February 8, 1917, the committee caused a subpoena to be issued and placed in the hands of process servers, which subpoena such process servers have been unable to serve. In another case a subpoena was also issued by the committee on February 8, 1917, and delivered to such process servers for service on one of the most prominent men connected with the industry, for service upon him, and that although such process servers have been making diligent effort to make such service, they have been unable to do so, although such process servers believe such individual well knows that the attempt is being made to serve him, and he is intentionally avoiding such service.

The committee believes that within the next few days it will be able to obtain the attendance of such additional persons as may be necessary to disclose to the committee the information which it is necessary for it to have prior to making its final report.

For all these reasons, this committee is obliged to and does report that it has been and will be unable to complete its labors and properly perform the work required of it by the terms of the concurrent resolution under which it is acting, within the time specified by such concurrent resolution, to wit, February 15, 1917, and is obliged to ask for an extension of the time within which it may report, and states that it expects to and is satisfied that it can make its final report if such time is extended to the 15th day of March, 1917.

The Committee also asks the Legislature to take appropriate action concerning the contempt of Joseph W. Engel as herein reported.

Respectfully submitted,

HEBER E. WHEELER,

Chairman.

Dated, February 12, 1917.

EXHIBIT A

JANUARY 28, 1917

GENTLEMEN:—As you are doubtless advised, the State Legislature by resolution has appointed a committee "to Investigate whether the moving picture industry is a proper subject of State taxation, and if the Committee so deems, the kind and amount of taxes to be imposed," and has authorized such Committee "to require the production of books, records and papers, to take and hear proof and testimony, and otherwise have all the powers of a legislative committee as provided by the Legislative Law."

The Committee is now engaged in such work. In order to enable it to properly discharge its functions, it is obliged to call upon your company and other leading concerns in the moving picture industry to furnish it certain data necessary to enable the Committee to reach proper conclusions.

Enclosed herewith please find a list of questions which the Committee desires to have answered by some one connected with the company who is familiar with the details of its business, and for the answering of which this Committee will be obliged to you.

I do not need to tell you that the Committee intends to and will deal fairly and impartially in the treatment of this matter, and that it expects and has been advised by the National Association of the Motion Picture Industry that the trade is not only willing, but anxious to furnish the information asked for in these questions.

The Committee hearings now stand adjourned to Wednesday, January 31st, at the Murray Hill Hotel, at 11 o'clock A. M.

If you will have the written answers to these questions and the information called for thereby in my hands on or before next Wednesday, it will be very much appreciated.

In addition to the information called for by these questions, the Committee also asks that your company produce and have present all inventories, balance sheets and audits made for or by the company, as well as its subsidiary or allied companies during the past two years. Also all cost sheets showing the cost of production of each of the pictures which your company has produced or purchased during the year 1916.

The Committee will want some one representing your company and who is in position to testify to the accuracy of the answers to the questions enclosed to come before the Committee and testify regarding the information called for. Will you kindly indicate to me the name of the person connected with your company who will do this?

Very truly yours,
HEBER E. WHEELER,
Chairman of Committee.

EXHIBIT B

1. Corporate name of company.
2. Date when and name of state in which incorporated.
3. Location of principal and branch offices, giving city, street and number.
4. If a foreign corporation, give location of each office and place of business of the company in the State of New York, the kind or class of business conducted by the corporation in this State, and the name of the person in charge of each such office, with his official title.
5. Amount of the company's original authorized capital stock, and dates and amounts actually issued.
6. Has capital stock been increased? If so give date and amount of each increase authorized, and of increased capital issued.
7. Classification or description of stock.
8. The par value of each share.
9. Name and post office address of each stockholder, giving number of shares of stock owned by each, as appeared on the books of the company on January 1, 1917.
10. Names and addresses of officers and directors of the company.
11. Statement of amounts paid each year to each officer, director and general manager of the corporation since the date of its incorporation in the way of salary, compensation for services or otherwise.

12. A statement of the amounts which the company has paid each year to each director having charge of the production or distribution of its pictures.
13. An itemized statement of all royalties and commissions paid by the company to any of its stockholders, officers or employees during each year since its incorporation, the name of the persons to whom paid, and purposes for which paid.
14. General description of real estate owned or leased by corporation in this State and where located.
15. General description of real estate owned or leased by a corporation outside the State of New York, with location thereof.
16. Total amount of cash actually invested by company in tangible property, with general description of such property and its location.
17. Total amount of cash actually paid to and received by the company for capital stock issued.
18. If capital stock issued in whole or in part for property or labor, give general description of such property and the amount for which it was turned into the company.
19. Total indebtedness of the company in notes or bonds, with statement of date when, purposes for which, and names of persons or corporations to whom issued, together with rate of interest, and how secured.
20. Does any officer, corporate director, manager, director of production, or other employee of the company have any contract or arrangement with the corporation by which he has received or is to receive any royalties, commissions, compensation, benefit, emolument, or thing of value, other than his fixed salary? If so, give names of such persons and statement as to amounts so paid and for what.
21. Total amount of dividends declared or paid by the company since its incorporation, with dates of payment, and whether such dividends have been in cash or otherwise.

22. Itemized statement of royalties, commissions, or other form of compensation which the company has received or is receiving from any story, scenario, play or picture owned by it or in which it has any interest, and which has been or is being produced or distributed by or through any other corporation or concern.
23. Statement of the number of exchanges, including branches, operated by or through which your corporation distributes its pictures in this State, giving name and location of each, and whether owned or controlled in whole or in part by your company through stock ownership or otherwise.
24. Statement of the name, location and seating capacity of each theatre in this State served in whole or in part by pictures manufactured or distributed by your company or its subsidiary or allied companies and concerns.
25. Of such theatres, state which ones are exclusively motion picture theatres.
26. Total number of exchanges and branches located in the United States and Canada operated by or through which your company distributes its pictures, with location and names of such exchanges. Do such exchanges handle pictures of producers other than your company?
27. Has your company any foreign trade or business? If so, give description of such business and where located and how conducted.
28. Statement of average number of prints made of each picture produced or distributed by your company.
29. Statement of the average number of prints of each picture which are distributed in this State by your company.
30. The average length of time between the release of any given picture and the date when it has completed the circuit of the zone in which it is operating, and has become "dead."
31. Total number of pictures produced by your company each year since its incorporation, with the number of reels in each picture and number released each year.

32. Average length of the print of the pictures so produced by your company.
33. Average cost per foot of the negative of each picture produced by your company up to and including the making of the negative, and not including special feature pictures nor cost of advertising.
34. Cost of advertising paid by your company each year in connection with the marketing and distribution of pictures, during the last three years.
35. Average cost per foot of the raw film used in the production of your pictures, stating where and from whom the same is purchased.
36. Average cost per foot to your company of printing each print.
37. The total amount in feet of raw film purchased by your company each year during the past three years, with name of the corporation or concern from which purchased.
38. Name and location of each studio or place where the corporation's pictures are produced.
39. Has your company purchased pictures from or distributed them for any other concerns? If so, name such other concerns and state generally the kind and the extent of such business and on what basis it is done.
40. Do you distribute your pictures through any exchanges or concerns except those owned or controlled in whole or in part by your company? If so, state through what exchanges it is done and on what terms.
41. Does your company produce pictures for any other companies or concerns? If so, what ones and on what terms.
42. Does your company have any interest, direct or indirect, in the way of stock ownership or otherwise in any other corporations or concerns engaged in any of the so-called "branches" of the moving picture industry? If so, name all such corporations and concerns, giving the kind and location of the business conducted and the kind and extent of your interest therein.

43. Give itemized statement of all taxes of every kind paid by your corporation or the corporations or concerns in which your corporation is interested, during each of the past three years, to the Federal Government, to the State of New York, and to each municipality in the State of New York, giving the date and amount of each such payment, to whom and for what purpose paid.
44. Give the total number of reels released each week in 1916 in this State by your company.
45. What is the general practice of your company or the subsidiary corporations or concerns through which it distributes its pictures in requiring the exhibitors to make deposits, and the amount of deposits which it requires as security for the payment of accounts and return of reels, or otherwise.
46. State generally whether the distribution of pictures released by your company is on a cash basis. If not, what are the average terms of credit?

EXHIBIT C

ALBANY, N. Y., February 7, 1917.

To Joseph W. Engel:

SIR:—In pursuance of a joint resolution of the Senate and Assembly, adopted January 3, 1917, of which the following from the Senate Journal is a copy:

On motion of Mr. Brown:

“*Resolved*: (If Assembly concur), That a joint committee of the Senate and Assembly be hereby created to consist of three members of the Senate, to be appointed by the president of the Senate and five members, to be appointed by the Speaker of the Assembly, to investigate whether the moving picture industry is a proper subject of State taxation, and if the committee so deems, the kind and amount of taxes to be imposed.

“*Resolved*, That such committee is hereby authorized to choose from its members a chairman and to sit within and

without the city of Albany to subpoena and compel the attendance of witnesses, to require the production of books, records and papers, to take and hear proof and testimony, and otherwise have all the powers of a legislative committee as provided by the Legislative Law, including the adoption of rules for the conduct of its proceedings.

"Resolved, That such committee shall report the result of its investigation to the Legislature on or before February 15, 1917, together with such proposed legislative measures as it may deem proper to carry its recommendations into effect.

"Resolved, That the expenses of such committee, not exceeding five thousand dollars (\$5,000), shall be payable from the contingent fund of the legislature upon the certificate of the chairman of the Committee and the approval of the temporary president of the Senate or the Speaker of the Assembly."

(Which said committee has been duly appointed and is now acting.)

You are hereby notified to attend before said Committee at Parlor O in the Murray Hill Hotel, Park avenue and Forty-first street, borough of Manhattan, New York city, on February 9, 1917, at eleven o'clock in the forenoon, there to give such information, touching the subject of inquiry as may be in your possession.

You are hereby further directed to bring with you before said Committee, all inventories, balance sheets and audits made for or by the Metro Pictures Corporation, together with its answers to the questions propounded to it by me on January 28, 1917, and such other documents in your custody as may be required in the investigation of the said subject.

By order of the Committee,

(Signed) HEBER E. WHEELER,

Chairman.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:
City of New York,

Robert S. McLellan, being duly sworn, deposes and says that he is forty-two years of age, and resides at 265 West 23d street, city of New York, borough of Manhattan, and is and for fifteen

years last past has been engaged in the business of serving processes in the city of New York.

That on the 8th day of February, 1917, at the Murray Hill Hotel, in said city of New York, duplicate subpoenas, of which the annexed is an exact copy, were delivered to him by Honorable Heber E. Wheeler, Chairman of the Joint Committee of the Senate and Assembly, to investigate whether the moving picture industry is a proper subject of state taxation, and which said subpoenas were directed to Joseph W. Engel, who, as this deponent was informed and believes, was and is the treasurer of the Metro Pictures Corporation, with its principal office and place of business at 1476 Broadway in said city of New York, with directions from said chairman to serve such subpoena upon said Joseph W. Engel forthwith.

That deponent thereupon and on said 8th day of February, 1917, went to the office of said Metro Pictures Corporation at 1476 Broadway, in the city of New York, and then and there served said subpoena on said Joseph W. Engel, by delivering to and leaving with said Engel personally one of the originals of said subpoena, and that he knew the person so served, as aforesaid, to be the person named in and to whom such subpoena was directed, and which said service was made between five and six o'clock in the afternoon of that day.

Deponent further says that at the time when he served such subpoena as aforesaid on the said Joseph W. Engel, he informed said Engel that such paper was a subpoena from the Legislature, and required him to appear at the Murray Hill Hotel the following morning at eleven o'clock. Whereupon, said Engel stated to deponent that he would be busy the following day and desired to appear later. Whereupon, deponent stated to said Engel that he, said Engel, would have to take that matter up with the chairman of the committee, Assemblyman Wheeler, who was at the Murray Hill Hotel in said city of New York. Said Engel then said to deponent, "What is the matter with telling the chairman of the committee to telephone me?" to which deponent answered, "I don't know anything about that, you had better take that up directly with the chairman."

Deponent further says that he has read the original letter from said Joseph W. Engel to Honorable Heber E. Wheeler, dated February 9, 1917, in which said Engel states that said Wheeler's representative "asked me to be present today before your Committee, and he was kind enough to convey my message of appreciation to postpone my testimony until Tuesday, owing to the fact that important duty will not permit my being present." And deponent says that such statement is not true and that he did not promise said Engel nor give him any assurance that he would convey any message to said Wheeler or anyone connected with the Committee, nor did he consent to the postponement of the appearance of said Engel.

(Signed) ROBERT S. McLELLAN.

Subscribed and sworn to before me
this 12th day of February, 1917.

(Signed) VIRGINIA E. V. MOORE.

(Seal) Notary Public No. 426, New York County, Register's
No. 8320. Commission Expires March 30, 1918.

(Copy)

METRO PICTURES CORPORATION,
1476 BROADWAY, NEW YORK.

FEBRUARY 9, 1917.

HON. HEBER E. WHEELER, *Murray Hill Hotel, Park Ave. and Forty-first Street, City:*

MY DEAR SIR:—Your representative called last evening, and asked me to be present today before your committee, and he was kind enough to convey my message of appreciation to postpone my testimony until Tuesday, owing to the fact that important duty will not permit my being present.

I shall be delighted to be present on Tuesday, and I wish to thank you and the committee for this consideration.

Very truly yours,

(Signed) JOS. W. ENGEL.

JWE/K

P. S.—I presume the same hour, eleven in the forenoon, is the time you would like to have me present.

ANNUAL REPORT

OF THE

ATTORNEY GENERAL

OF THE

STATE OF NEW YORK

For the Year Ending December 31, 1916

EGBURT E. WOODBURY
Attorney-General

MERTON E. LEWIS
First Deputy

TRANSMITTED TO THE LEGISLATURE JANUARY 16, 1917

ALBANY
J. B. LYON COMPANY, PRINTERS
1917

R E P O R T

For convenience in use, this report is published in one volume. The first part of this volume is given up to a discussion of general office activity and recommendations. The second part contains the opinions of general public interest, formal and informal, reports, memoranda and communications.

STATE OF NEW YORK

No. 28

IN SENATE

JANUARY 16, 1917

ANNUAL REPORT OF THE ATTORNEY-GENERAL

To the Legislature of the State of New York:

In conformity with the requirements of section 66 of the Executive Law, I have the honor to submit herewith the annual report of the Attorney-General for the year ending December 31, 1916.

EGBURT E. WOODBURY,
Attorney-General.

By MERTON E. LEWIS,
First Deputy.

**TOTAL MONEYS COLLECTED BY THE ATTORNEY-
GENERAL DURING THE YEAR 1916**

Recovered on the bonds given by the Shanley-Morrissey Company, Barge Canal contractors.....	\$469,409 38
Recovered under agricultural and pure food laws..	53,831 29
Recovered for maintenance account State hospitals,	118,724 67
Costs and disbursements, State hospitals.....	6,628 09
Recovered under Conservation Law.....	15,197 02
Franchise taxes and interest on same.....	3,032 47
Stock transfer taxes ..	1,655 50
Mortgage tax	1,390 78
From estates of decedents	3,900 07
Penalty, violation of Public Health Law.....	40 00
Recovered on contracts	73 57
Deposit returned from United States District Court	
Fees erroneously retained by county clerk (People v. Sutherland)	19 55
	48,278 81
Recovered on highway contract from Flood & Van Wirt Company	3,700 00
United States Deposit Fund Mortgages	1,050 78
Costs and disbursements	8,471 23
<hr/> Total	\$735,403 21

R E P O R T

In the conduct of the legal business of the State during the year 1916 the wisdom of the division of the organization of the office of the Attorney-General into bureaus has become more and more apparent. The Attorney-General, of course, has a personal and direct supervision and control of all of these various bureaus, but the detail of one deputy to each of the bureaus, who can be held responsible for the prompt transaction of the business of that bureau, has inevitably tended to produce better and more satisfactory results than could have been obtained in any other way.

The Court of Claims Bureau, still in charge of Deputy Attorney-General Carey D. Davie, has been active throughout the entire year in the effort to complete the disposal of the large number of claims against the State, growing out of the Barge canal construction, highway improvements and a considerable number of negligence and other actions in which damages from the State are claimed.

During the year 1,366 claims have been disposed of, which claims amounted in the aggregate to \$22,495,919.12. In 600 of such cases, in which trials were had before the Court of Claims, the amount claimed was \$10,302,144.75. The amount allowed by the Court of Claims in such 600 claims was \$2,038,502.26. Three hundred and five cases have been tried in which judgments have not yet been rendered by the court. The amount claimed in such 305 cases is \$7,659,227.23. Four hundred and sixty-one cases were tried and dismissed. Judgment rendered by the Court of Claims during the year 1916 in 215 cases tried during the year 1915 amounted to \$1,944,867.72. The amount claimed in such cases was \$5,163,453.71. During the year 1916 1,096 new claims were filed against the State.

The Conservation Bureau remains in charge of Deputy Attorney-General A. Frank Jenks. It is the duty of this bureau to prepare for trial and to prosecute all actions for violations of the Conservation Law and all actions to recover possession of prop-

erty within the forest preserve owned by the State. The Conservation Bureau has recovered during the year and turned in to the treasurer of the State \$15,197.02 as costs and penalties. The head of this bureau also is the legal adviser of all divisions of the Conservation Commission, and in that capacity has rendered numerous opinions to the Conservation Commission.

Deputy Attorney-General Anson Getman has continued during the year in charge of the work of the Title Bureau. During the year that bureau has examined and approved abstracts of title covering 765 parcels of land appropriated for Barge canal purposes. The value of the lands covered by these abstracts, as determined by the Court of Claims, or by the special examiner and appraiser, together with interest thereon from the date of the appropriation, amounts to more than \$3,500,000. Titles involving about 800 appropriations still remain to be examined, together with such titles as may be presented upon lands yet to be appropriated. It is probable that during the year 1917 the examination of all titles to lands appropriated for canal purposes may be completed and approved.

In the Bureau of Appeals from Awards of the Industrial Commission, Deputy Attorney-General E. Clarence Aiken has remained in charge during the year. Four hundred and fifty-two appeals were taken in such cases during the year 1916, 410 of which were from the State Industrial Commission to the Appellate Division and forty-two from the Appellate Division to the Court of Appeals. During the year 121 appeals were argued in the Appellate Division, of which 86 were affirmed, 25 reversed and 10 remain undisposed of. Of the 25 reversed, 8 were sent back to the Commission for further consideration. Twenty-seven cases were argued in the Court of Appeals, resulting in 16 affirmances, 9 reversals and 2 appeals remaining undetermined on December 31st.

The Bureau of Special Franchise Tax Matters has been under the charge of Deputy Attorney-General James T. Cross. During the year there have been instituted more than 1,200 certiorari proceedings to review special franchise assessments against public service corporations. One hundred and fifty-seven proceedings have been finally disposed of and fifty-one have been tried and are now awaiting decision. Negotiations for the adjustment of the remaining proceedings are pending, and many, if not all of these cases, will be disposed of without trial.

Deputy Attorney-General Charles M. Stern has continued in charge of the Bureau for the Prosecution of Violations of the Agricultural and Pure Food Laws, and has prosecuted numerous violations of such laws. The Commissioner of Agriculture has certified to the Attorney-General 1,860 violations of the agricultural and pure food laws during the year 1916. These violations have been referred to the bureau and have had the undivided attention of Mr. Stern and his assistants. The Attorney-General has received through this bureau, in penalties, costs, etc., for violations, the sum of \$53,831.29. During the year 1,705 cases have been disposed of.

Deputy Attorney-General Edward A. Gifford has remained in charge of the Bureau of Approvals of Contracts, Bonds and Undertakings, and has given careful attention to all contracts, bonds and undertakings submitted to him for approval and has also given much attention to litigations growing out of the foreclosure of liens in actions to which the State is a party.

Deputy Attorney-General Alex T. Selkirk has had charge of the State Hospital Bureau during the year. The bureau has recovered from inmates of State hospitals or their relatives, for the maintenance account of such hospitals, the sum of \$118,724.67. In addition it has recovered as costs and disbursements the sum of \$6,628.09.

The Bureau for the Collection of Delinquent Corporation Franchise Taxes has also been in charge of Deputy Attorney-General Selkirk. This bureau has prosecuted diligently numerous claims against delinquent corporations. Many of these claims have been for small sums, but the effect of the activities of the bureau has made itself apparent in the change in the attitude of corporations, and their more prompt replies to the Tax Commission and submission of reports required by statute upon which to base assessments.

THE LONG SAULT DEVELOPMENT COMPANY

This corporation was chartered by an act of the Legislature, chapter 355 of the Laws of 1907. It was authorized to erect, maintain and operate dams, canals, reservoirs and necessary ap-

purtenances for the development of the water power of the St. Lawrence river, and for the development of electrical power and energy therefrom at or near the Long Sault islands, subject to the obtaining by the company of the consent of the Canadian government and the government of the United States.

The Senate, at the session of 1912, adopted a resolution requiring the Attorney-General to advise the Legislature upon the subject of the constitutionality of the act. The Attorney-General, in January, 1913, submitted to the Senate his opinion, in which he held that the act was unconstitutional. Acting upon the advice of the Attorney-General, the State Treasurer, in February, 1913, refused to accept a payment of moneys directed by the act to be paid to and received by the State Treasurer. The company thereupon applied for a peremptory writ of mandamus to compel the Treasurer to accept such payment, and from the order of the Special Term of the Supreme Court denying such application an appeal was taken to the Appellate Division and thence to the Court of Appeals. The Court of Appeals, on June 9, 1914, in an opinion written by Chief Judge Bartlett, held that the entire statute creating the corporation was void for the reason that by its passage the State had abdicated, or had attempted to abdicate, its control over the St. Lawrence as a navigable river at the Long Sault islands.

In the meantime the Legislature, acting also upon the advice of the Attorney-General, had repealed the charter of the corporation, thereby depriving the corporation of its corporate existence and nullifying, so far as it was in the power of the Legislature to nullify, the grant of powers contained in the act of 1907.

The case was taken by the Long Sault Company to the United States Supreme Court on a writ of error and came on for argument early in the year before a court consisting of but six members. After the lapse of several weeks from the date of the argument, and at the time of the summer recess taken by the court, an order was made setting the case down for reargument at the October term. It was reargued in October before the full court, and early in December the decision of the court was rendered, sustaining the position which I had taken and declining to take jurisdiction on the ground that no federal question was involved.

The results of this litigation, coupled with the repeal of the act of 1907 by the Legislature, leaves the State in the precise position which it occupied prior to the passage of that act. It has been estimated by experts that several hundred thousand horse-power of electrical energy can be generated at the point in the St. Lawrence river described in the act which was passed for the benefit of the company, and, of course, until developed, such potential energy is being wasted every year. The problem confronting the State is, What shall be done, if anything, to make available to the people of the State this valuable natural resource? This problem is not easy of solution. The rapidly increasing cost of producing electrical energy by steam power seems to emphasize the necessity for the development of all of the water powers of the State as rapidly as possible, in order that such electrical energy can be used instead of steam-produced electrical energy, and thereby aid in the development of manufacturing and transportation enterprises which either now exist or which may easily come into existence as a result of such development.

It is not within the province of the Attorney-General to advise the Legislature on questions of policy. I am submitting herewith the facts in connection with this situation. It seems to me that I am justified in calling these facts to the attention of the Legislature, and I hope that I may be pardoned for suggesting to the Legislature the desirability of a careful study of the problem.

SURPLUS WATERS

In the course of the construction of the Barge canal it has been necessary for the State to appropriate lands and waters in many sections of the State. As a result of such appropriations the State is at the present time the owner of valuable water power rights and privileges in addition to those which it previously owned.

For example, it owns certain water rights and privileges in the races leading from the Johnson and Seymour dam in the Genesee river in the city of Rochester; the water rights on the lower Fulton dam, for which it paid to the Fulton Light, Heat and Power

Company the sum of about \$300,000; valuable water power rights available at the Crescent and Vischer's Ferry dams on the Mohawk river; at Dam No. 1 in the Hudson river just north of Waterford; at dams erected in the Clyde river at May's Point and at Clyde, and the water power available from the dam at the foot of Cayuga lake. It owns the water power available at the new High dam in the Oswego river, and claims to own a portion of the power available at the new Minetto dam. Further than this, the surplus waters flowing in the artificial canals are at many places available and valuable for power and other purposes.

Prior to the passage of the Barge Canal Law certain leases had been granted for the use of the surplus waters created or impounded by the then existing canals or works connected therewith. These leases were made under the provisions of the law applicable to the canals as they existed prior to the enactment of the Barge Canal Law. It seems that there are at present only three of these leases still in existence. No leases have been made in recent years.

In 1907 the Legislature, by chapter 494, provided a new section to such chapter, known as section 16, which reads as follows:

“ § 16. The waters, surplus or otherwise, created or impounded as a result of the improvement of the Erie, Champlain and Oswego canals, pursuant to the provisions of this act, or from the construction of any dam or dams, mole or moles, reservoir or reservoirs, or other structures, connected therewith, shall not be leased, sold or otherwise disposed of until the improvement of said canals as contemplated in this act, and amendments thereto, shall have been finally completed, nor thereafter until authorized by statute setting forth specific terms, conditions and restrictions governing the same.”

My understanding is that it was the intent of the Legislature to prevent the sale or disposal of surplus waters at State dams until after an intelligent and comprehensive study of the entire subject could be made and a policy worked out and adopted which would protect valuable property rights of the State in such surplus

waters and insure to the State an adequate return therefor whenever disposed of.

An identical provision is found in section 4 of the Cayuga and Seneca Canal Law, chapter 391 of the Laws of 1909.

It seems proper for me to suggest at this time that it is expected that the Barge canal will be completed and open to navigation within the next two years, and that it would be well for the Legislature at the pending session thereof to provide for a comprehensive study of the situation, and that such study be completed in time to be submitted to the Legislature in 1918, in order that appropriate legislation may be enacted at the session of 1918 establishing a policy of the State in connection with such surplus waters and providing a method by which the State may obtain the great financial benefits which to me seem available for the use of the State whenever the canals shall have been completed.

SETTLEMENT OF THE STATE'S CLAIM AGAINST SHANLEY-MORRISSEY COMPANY

The Shanley-Morrissey Company, a New York State corporation, was the successful bidder for four large Barge canal contracts, the aggregate low bids for which amounted to \$4,606,000. The company failed before the completion of the work covered by such contracts, and its failure was followed by the failure of the People's Surety Company and the United Surety Company, which companies had furnished the bonds given by the contracting company at the time the contracts were awarded. The Bankers' Surety Company, also liable for one of the bonds, went into voluntary liquidation. The Empire Surety Company, which reinsured the original bondsmen, became insolvent and the National Surety Company and the Title Guaranty and Surety Company, also re-insurers of the original bonding companies, repudiated their liability.

As a result of the failure of the Shanley-Morrissey Company, the State was in a situation where it might have suffered a very heavy loss because of its inability to collect from the surety companies which had issued the bonds.

Negotiations conducted throughout the year 1915 terminated in March, 1916. As a result of such negotiations, a settlement was accomplished, and on March 13th I received for the benefit of the State \$469,000 in cash and securities in full settlement of the claims of the State against the contracting company and all others in any way liable to the State for such loss. In order to accomplish this settlement and accept the securities which were offered, I recommended to the Legislature of 1916 the passage of a bill, which was passed, permitting the settlement upon the basis herein set forth. The cash and securities were delivered to the Treasurer of the State upon the completion of such settlement.

LAND GRANTS BY THE LAND BOARD

In 1912 the State appropriated certain lands on Long Island, at the mouth of Newtown creek, for Barge canal terminal purposes. This appropriation was made by the filing of a map in the office of the county clerk of the county in which the land was located and service of a copy thereof upon the persons in possession of such lands. A claim was filed shortly after such appropriation for the sum of \$1,900,000. This claim was referred under stipulation by the Board of Claims in 1914 to Hon. Albert Haight, of Buffalo, then and now an official referee. The case was tried before Judge Haight and early in January, 1915, he rendered a decision allowing the claimants the sum of \$825,000. His decision was made the determination of the Board of Claims and judgment was rendered against the State for the amount allowed by Judge Haight.

From that judgment an appeal was taken to the Appellate Division, which subsequently affirmed the judgment by a divided court, and an appeal was thereupon taken to the Court of Appeals. Recently the Court of Appeals has rendered a decision affirming the judgment, and nothing further remains to be done in connection with the claim except to issue the warrant of the Comptroller for the sum of \$825,000, with interest thereon from the date of the appropriation in 1912.

The land appropriated, and for which the State is now called upon to pay this large sum of money, was granted by the State by action of the Land Board, acting under the provisions of the statute relating to such grants, to various individuals upon certain conditions expressed in the grants themselves. The conditions so expressed required that certain improvements be made on the property within fixed periods, and that upon the failure of the grantees to perform under such conditions, the grants themselves should cease, determine and be void. The period within which the compliance with such conditions could be made expired in 1891. At that time no effort had been made by the grantees to comply with the requirements of the grants, and not until after the expiration of such periods was anything whatever done in the way of compliance. After the expiration of the time in which compliance was required, some improvements were made which may or may not have constituted compliance, and the grantees and their successors in interest continued in possession of such lands until the appropriation by the State in 1912.

I can find no provision of law which makes it the duty of any public official to investigate and ascertain whether or not conditions embodied in grants of land made by the Land Board are ever complied with. This seems to me to be a defect in the law. Had the law made it the duty of the Secretary of State, in whose custody the records of the Land Board are kept, to certify to the Attorney-General at the end of each calendar year the grants previously made containing conditions as to improvements, the periods within which compliance with such conditions should be made having expired during such calendar year, it would have been possible for the Attorney-General to cause an investigation to be made to ascertain whether or not compliance had been had with such conditions.

I am submitting this concrete illustration of the results of the omission by the Legislature to provide for such certification, and I beg to express the hope that the Legislature may see fit to make such amendment to the Public Lands Law as may be necessary and appropriate for the purpose of preventing a recurrence of the experience through which the State has recently passed in connection with the claim of Palmer against the State.

CANASERAGA CREEK IMPROVEMENT

Since 1905, when an application was made for the improvement of the Canaseraga creek district in Livingston county under the River Improvement Law for regulation of the flow of the waters of the creek, there have been several actions brought to defeat the project, which have been successfully defended by the State. The work has been carried on by the Conservation Commission and was finally completed in 1916. An assessment of the benefits accruing to the 165 parcels in the district, which is about 10,000 acres in area, amounting in the aggregate to \$382,325, was made by George D. Pratt, Conservation Commissioner, the Attorney-General and the State Engineer and Surveyor, and filed in Livingston county clerk's office on November 1, 1916. Proceedings were at once instituted in the Supreme Court by the owners of 109 parcels to review the assessment, and writs of certiorari were issued. The various proceedings have been consolidated, a return has been filed and the entire question of the validity of the assessment will be tried before a referee.

INVESTIGATIONS

In January, 1916, the Governor, superseding the district attorney of Onondaga county, directed me to conduct the investigation and prosecution of alleged conspiracies for "graft" in the building of the Onondaga County Tuberculosis Sanatorium, near Syracuse. Deputy Attorney-General Alfred L. Becker was designated to take charge. He obtained within a few days the confession, upon promise of immunity, of one of the conspirators. The suicide of another and the voluntary confession of a third soon followed. Making a thorough investigation, lasting several months, of all the ramifications of the sanatorium project, the Deputy Attorney-General presented the cases to the grand jury, and obtained 165 indictments against seven different persons.

Before I was called upon to act, the head of the conspirators, Charles F. Mott, chairman of the building committee of the board of supervisors, had fled the country, a fugitive from justice. An extensive search finally located Mott in Buenos Ayres, Argentine

Republic. Extradition proceedings were initiated, and Deputy Attorney-General Becker went to South America, procured the arrest of Mott in Paraguay, whither he had again fled, and brought him in custody to Syracuse. He then tried Mott for bribery and secured his conviction and sentence to not less than four years and nine months' imprisonment. Another defendant was tried and acquitted by the jury in Jefferson county, the indictment having been removed there for trial on account of popular clamor in Onondaga county. A third defendant was tried and the jury disagreed, but he afterwards pleaded guilty to the same indictment and paid a fine of \$2,000. A fourth pleaded guilty and was sentenced to one year in the penitentiary. A fifth turned State's evidence and obtained immunity. The trials of the other two defendants have not yet taken place.

THE UNITED REAL ESTATE OWNERS' ASSOCIATION OF THE CITY
OF NEW YORK v. EUGENE M. TRAVIS, AS COMPTROLLER

This action was brought for the purpose of procuring an injunction restraining the defendant, as Comptroller, from procuring a temporary loan of \$6,000,000 to meet the expenses of the State government.

At the time the action was brought the Comptroller had ascertained that on June 30, 1915, there would be a deficiency in the State treasury of approximately \$4,000,000 and there would be no funds in the treasury on that date to pay the current expenses of the State government.

The plaintiff asked for a preliminary injunction restraining the Comptroller from borrowing the money, on the ground that it was a violation of article VII of the State Constitution for the Comptroller to borrow more than \$1,000,000.

I defended the action upon the ground that the Comptroller was authorized to make the temporary loan. The motion for a preliminary injunction was denied, and on appeal to the Appellate Division the order was affirmed and the action afterward dismissed. Plaintiff acknowledged that it was necessary for the State to borrow the money and that no loss resulted to the State.

The \$6,000,000 was paid back in October, 1915, and the State suffered no loss whatsoever through the transaction, but, on the other hand, the Comptroller was able through the borrowing of the money to carry on the business of the State from June 30, 1915, to October, 1915. The Comptroller borrowed the \$6,000,000 from six different banks in the city of New York on certificates issued by him. After the loan was consummated the plaintiff brought another injunction action to restrain the Comptroller from repaying the money borrowed on these certificates. That action was dismissed and the certificates were paid.

DANES v. THE STATE.

This claim was filed with the Board of Claims, asking for damages for the taking of certain uplands on the Mohawk river between Cohoes and Schenectady and for lands under water adjacent to the premises taken. An award was made by the Board of Claims for the uplands, and it was also held that claimants were entitled to compensation for the lands under the waters of the Mohawk river, although they had no conveyance of same, but claimed damages on the ground that they took to the center of the river.

An appeal was taken to the Appellate Division, and there the judgment was affirmed and the Appellate Division held that claimants' title by operation of law extended to the center of the Mohawk river adjacent to the premises taken by the State and that they were entitled to compensation therefor.

I appealed from the judgment of the Appellate Division to the Court of Appeals, where the judgment was reversed in so far as it made an award to claimant for damages for the ownership of the lands under the waters of the Mohawk river. The Court of Appeals held that claimants took no title to the lands under the waters of the Mohawk river by operation of law, and that the bed of that stream belonged to the State of New York.

PEOPLE v. FELTER.

The Comptroller made an examination of the affairs of the town of Haverstraw, Rockland county, and discovered some irregularities existing in the accounts of public officials of that town. The Governor called upon me to supersede the district attorney and directed me to investigate the affairs of the town of Haverstraw, Rockland county. I thereupon designated one of my deputies, Wilber W. Chambers, to take charge of the matter, and as a result a number of indictments were found, among which were several against defendant. He had been supervisor of the town for a number of years, and was indicted by the grand jury for the crime of grand larceny and misappropriation of public funds. He was tried at the September, 1916, term of the Supreme Court in Rockland county on one of the indictments for grand larceny and misappropriation of public funds, and the jury returned a verdict of guilty on the count for misappropriation of public funds, and he was fined. An appeal has been taken from the judgment, but has not been argued.

CLAIMS OF SENECA FALLS POWER OWNERS v. THE STATE

In the improvement of the Cayuga and Seneca canal, pursuant to the provisions of chapter 391, Laws of 1909, the State constructed a large dam east of the village of Seneca Falls, the pool of which dam submerged and destroyed three upper dams, from which, by a complicated system of races, nineteen different persons and corporations were drawing or were entitled to draw water for power purposes.

Following various appropriations of land and the destruction of said dams the said nineteen persons or corporations filed claims against the State aggregating several millions of dollars.

Two of the claims, to wit, the claims of the Gould Manufacturing Company and the LaFrance Fire Engine Company were settled or disposed of prior to the first day of January, 1915, and in December, 1914, the Board of Claims fixed upon the sum of \$617,748.01 as representing the value of the uplands, structures, etc., appropriated or destroyed by the State belonging to eleven of said nineteen claimants.

After January 1, 1915, I proceeded with the trial of the remaining claims and completed the trial of the claim of Rumsey Pump Company, Ltd., against the State, whereupon the said claimants entered into negotiations with a committee of the Canal Board in an endeavor to fix upon some basis upon which an adjustment could be had which would be mutually beneficial to the State and the said claimants.

After full investigation and consideration, said committee concluded that the aforesaid amount fixed by the Board of Claims was, all things considered, excessive and suggested to claimants that if all of the persons possessing any right to the use, for power purposes in said village, of the waters of said river would be brought into court so that their claims and demands could be adjudicated and passed upon by the Court of Claims at one and the same time and thereby a complete settlement effected, the Canal Board would, provided the evidence warranted it and the court so found, approve of the payment to them as a group and class of \$548,248.01 in settlement of all claims and demands whatsoever growing out of the appropriations of their property, whether upland or water rights and privileges, or out of the destruction of or interference with their property or property rights, excepting, however, from said proposition the claims of two of said claimants, Clary Bros. and the Seneca Falls Woolen Company, the value of whose upland it was agreed should be fixed by the Court of Claims. This proposition was acceded to by said water power owners and claimants, whereupon appropriation map No. 5099 was approved by the Canal Board and served upon said claimants. The appropriation affected by this map appropriated various upland parcels, the bed of the Seneca outlet and in substance the use of so much of the water of the Seneca outlet as was considered necessary for canal purposes, leaving the use of the residue and remainder thereof in the former water power owners to be made use of at the aforesaid new dam. Thereafter, and on or about May 3, 1916, the claims of the aforesaid water power owners were consolidated, pursuant to an order of the Court of Claims (amended claim known as 1646a) filed by said seventeen claimants and the Court of Claims after hearing the proof offered by the claimants and the State awarded to said claimants as a group

or class the sum of \$548,248.01, with interest from the 1st day of July, 1914, and adjudicated and defined the rights of the State and the said owners respectively in and to the use of the waters of said outlet substantially as provided for in appropriation map No. 5099.

On March 23, 1916, a judgment was entered in accordance with said findings for the sum of \$596,253.72, being the amount of the award with interest, which judgment has been paid and satisfied.

On March 13, 1916, the court allowed Clary Bros. for their uplands appropriated and upland damages the sum of \$25,264.

The claim of the Seneca Falls Woolen Company for value of uplands taken and damages to its unappropriated uplands has been tried, but no judgment has yet been rendered.

The only other item in the said nineteen claims which has not yet been disposed of is the claim of the Interlake Tissue Mills Company (a tenant of the Seneca Falls Paper Company) which filed a claim against the State for the roiling of water and interference with the water power appurtenant to the property of the Seneca Falls Paper Company. This claim has not as yet been tried. The State holds an instrument whereby certain responsible persons agree to indemnify the State against any recovery made on certain items of said claim.

I might add that the matter of the adjustment and settlement of these nineteen claims has been under consideration by the Attorney-General and Canal Board for more than four years; that we succeeded in reducing the sum to be paid said claimants far below the items of said claims and considerably below the findings of the Court of Claims as to damages sustained by the first named eleven claimants, and that we believe the appropriation effected by map No. 5099 makes ample provision for all canal requirements and that in effecting the foregoing settlement we have secured an adjustment of said claims distinctly advantageous to the State.

SALMON RIVER POWER CO. v. THE STATE

This claim, which was for the sum of \$607,500, was originally filed by the Empire United Railways, Inc., Rochester, Syracuse and Eastern Railroad et al. against the State. It grew out of the appropriation for Barge canal purposes of parcel 3261. The claimant maintained a large power house which furnished power for the operation of the Rochester, Syracuse and Eastern Railroad. Water was taken from the Clyde river in connection with the operation of said power house. The appropriated parcel 3261 intervened between the power house and the Clyde river, thus isolating the power house from the river and cutting off means of access between the river and the power house, and thereby depriving the claimant of a water supply, with the result that, as claimant contended, the power house property was rendered practically valueless.

Subsequent to the filing of the claim, the Salmon River Power Company succeeded to the title, rights, claims and demands of the claimant, and by order of the Court of Claims was duly substituted as claimant for the original claimant.

After extended conferences between claimant, its representatives and a committee of the Canal Board, the Canal Board on the 13th day of December, 1916, for the purpose of reducing the damages which claimant would otherwise sustain by reason of said appropriation, adopted a resolution providing in substance for the execution and delivery to said Salmon River Power Company of a deed vesting it with certain easements in the appropriated parcel and certain other parcels of land which would enable it to continue as formerly to take water from the Barge canal and the Clyde river in connection with the operation of said power house.

Following the execution and delivery by the Superintendent of Public Works to the Salmon River Power Company of a deed pursuant to said resolution, the claims came on for trial before the Court of Claims at a special term thereof held in the city of Syracuse on the 28th day of December, 1916, and resulted in the entry of a judgment in favor of the Salmon River Power Company in the sum of \$100,250..

BATTLE ISLAND POWER COMPANY v. THE STATE.

This was a claim in the sum of \$1,200,000 for the value of certain uplands on the east bank of the Oswego river in the city of Oswego at the location of Barge canal dam No. 6 and the appurtenant water rights, alleged to consist of the right to the use of one-half of the surplus waters of the Oswego river. This claim was moved for trial by the State at a special term of the Court of Claims held at the city of Oswego in June, 1916, whereupon claimant waived and withdrew its claim against the State for the value of said alleged water rights. Following the trial a judgment was awarded to claimant for the value of the land without such water rights in the sum of \$3,250, with interest.

A stipulation was entered into, in substance, that claimant would not at any time make claim against the State for the value of said alleged water rights, thus disposing of the claim in its entirety.

WEST VIRGINIA PULP AND PAPER Co. v. PECK.

The West Virginia Pulp and Paper Company owns and operates a large paper mill on the west bank of the Hudson river in the city of Mechanicville. Pursuant to the provisions of chapter 406 of the Laws of 1882 and chapter 683 of the Laws of 1900 it constructed a dam across the Hudson river, from which it derived power for the operation of said mill. The State in canalizing the Hudson river pursuant to the Barge Canal Law constructed a lock in the easterly end of said dam suitable and adaptable to the elevation of the paper company's dam as it then existed. Subsequent to the construction of said lock the paper company placed sixteen-inch flashboards on said dam. The Superintendent of Public Works, claiming that the continued maintenance and operation of said flashboards would operate prejudicially to the maintenance and operation of said lock, forcibly removed the flashboards, whereupon claimant brought this action in the Supreme Court to restrain the Superintendent from interfering with said flashboards, and filed in the Court of Claims a claim against the State for damages in the sum of \$5,046,067.46 growing out of the alleged appropriations and acts of the State.

The State contends that it owns the bed of the Hudson river, even above tidewater; that the rights and privileges granted to the paper company by the acts aforesaid are subject and subservient to an implied reservation in the State of a right at any and all times to improve the navigability of the Hudson river; that the work in question is such an improvement, and that, inasmuch as the paper company's rights or interests conflict with those of the State, the former must yield; that the paper company is not entitled to the maintenance of flashboards which will interfere with the maintenance or operation of said locks and can recover no damages growing out of the aforesaid acts of the State.

The case was tried at Schenectady in September, 1916, and briefs are shortly to be filed. Several very important questions are involved in the case, among others the question whether or not the State holds title to the bed of the Hudson river above tidewater; the nature and extent of the grants effected by the aforesaid and similar statutes and the question whether or not the Barge canal improvement is in fact the exercise of the State's sovereign right to improve the navigation of rivers navigable in fact. A decision favorable to the State in this case will operate to save the State from the payment of large sums of money.

HINCKLEY FIBRE COMPANY v. THE STATE.

The State, pursuant to the provisions of section 3 of the Barge Canal Law, constructed a storage reservoir on the West Canada creek near the village of Hinckley. Immediately below this dam was located the sulphite mill of the Hinckley Fibre Company. For many years this claimant had been accustomed to obtain its pulp wood from woodlands located on the West Canada creek and its tributaries above its mills, floating the same down to its mills. The construction of the dam not only appropriated certain of the property and property rights of the claimant but isolated and cut off the sulphite mill from its wood supply. The claimant filed four separate claims against the State for the value of certain land appropriated, value of water rights and privileges appropriated, destroyed or interfered with, the diminution in value of

its sulphite mill property and wood supply, etc. The four claims, 1312a, 2779a, 2780a, 2781a, aggregated the sum of \$3,433,664.

After numerous conferences and extended negotiations between a committee of the Canal Board and the claimant and its representatives, the Canal Board on the 27th day of July, 1916, for the purpose of reducing the damages which claimant would suffer as a result of said appropriation and acts of the State, adopted a resolution providing in substance for the granting to the claimant of certain easements in the aforesaid State dam, including the right to float logs through and take logs over the same from its wood supply to its sulphite mill. Following the execution and delivery by the Superintendent of Public Works to said claimant of a deed pursuant to said resolution, a trial of the aforesaid claims was had before the Court of Claims at Albany in July, 1916, resulting in the entry of a judgment in favor of the claimant for the sum of \$175,000, thus disposing of the aforesaid four claims on terms considered advantageous to the State.

JAMES H. GOBLE ET AL V. THE STATE

Another claim for \$100,257, arising from the appropriation by the State of dry dock property in the Oswego harbor, including buildings which were used for boat building and repair purposes was disposed of during the year. James H. Goble et al were the claimants. In the trial of this action witnesses were sworn by the claimants in support of the claim. The Attorney-General offered evidence indicating that it was greatly exaggerated. The examination of one of the claimants brought out an admission that at the time of the appropriation of the property by the State the owners had offered the whole plant for sale for something over \$14,000. The result of this admission and the other evidence offered by the State resulted in an award by the Court of Claims of \$17,000, less than 20 per cent of the total of the original claim.

CENTRAL DREDGING COMPANY v. THE STATE

The claim of the Central Dredging Company for \$104,085 was opposed in the Court of Claims. After proof had been submitted by the claimant to the effect that this concern had suffered a loss of the total amount of the claim, the cross examination of the claimant's witnesses disclosed that the claim was exaggerated. At this point claimant's counsel refused to continue the trial of the action and requested representatives of the State Engineer to make him an offer of settlement such as he considered was reasonable from the viewpoint of the claimant. An offer of \$20,000 was made by the Engineer's office. This was accepted and judgment was entered accordingly.

THOMAS G. HINDS, AS TRUSTEE, ETC., OF THE MEDINA GAS COMPANY, v. THE STATE

The claim of Thomas G. Hinds, as trustee of the Medina Gas Company, involved the appropriation of a portion of the Medina Gas Company's plant. The amount demanded was \$46,500, a large percentage of which was sought to be recovered because of alleged consequential damage resulting from the appropriation. The claim for consequential damages was disallowed and an award was made by the Court of Claims of \$2,500.

I. M. LUDINGTON'S SONS, INC., v. THE STATE

The claim of I. M. Ludington's Sons, Inc., of Rochester, was for the sum of \$172,675.04. It grew out of the claimant's work as contractor on Barge canal contract No. 62, covering fourteen miles of Erie canal enlargement in Orleans county. Exceptional difficulties arose during the work, giving rise to numerous claims for items of extra work, delay, etc. The claim had a lengthy trial before Judge Albert Haight, official referee. He awarded \$44,226.91. No appeal was taken.

NEW YORK CITY BUREAU

The New York City Bureau of the Attorney-General's office has made great progress during the year 1916, in the matter of special franchise tax settlements. On December 31, 1915, there were pending and at issue in that office 288 speial franchise tax proceedings. The assessments involved in these actions on that date totaled \$1,216,248,900. The proceedings affected assessments running back in some instances to 1907. The New York City Bureau has adjusted or settled 106 of these actions, involving total original assessments of \$525,500,000. In addition a large part of the preliminary work required and looking to the final disposition of the remaining cases, has been performed. This bulk of litigation was augmented during the year just closed by the addition of forty-two new cases embracing total assessment figures of \$282,153,144. It is expected that the year 1917 will see the settlement by trial or adjustment, of practically all of the larger assessments down to the year 1916. Deputy Attorney-General Leonard J. Obermeier reports that the prospect of more expeditiously and satisfactorily settling or disposing of this litigation is brighter, chiefly because of the greater degree of co-operation that has been effected between the local municipal authorities, the State Tax Commission and the Attorney-General's office.

The so-called Steeplechase Park case, involving the right or title of the State to the foreshore of Coney Island, constituted one of the important activities of this bureau in the past year. Under a judgment of the Court of Appeals in this case steps were taken to remove obstructions at Coney Island. All obstructions, as shown by the survey of the Dock Department, have been removed, except the obstructions at the foot of 23rd street, known as Silver's Bath House, and the Brighton Beach Baths, situated at Brighton Beach. Litigations designed to prevent the State from asserting its right of clearance of the foreshore were instituted by the owners of these properties. Determination of these proceedings is expected in the near future. Until such settlement, clearance activity by the State will remain at a standstill. The work of removal of all obstructions on the foreshore or littoral at Coney Island has met with the approval of the city authorities and with the approbation of the public in the metropolitan territory.

The so-called Riverside Drive smoke nuisance, a condition created by the operation of manufactories on the Jersey shore, engaged the attention of this bureau during the year. This nuisance had its origin in the exhalations from these factories which polluted the atmosphere in that section of New York city known as Riverside Drive. For years this condition had agitated the press of New York city which voiced the indignation felt by property owners and residents of that territory.

The Attorney-General's office instituted proceedings designed to compel these New Jersey manufacturers to desist from this pollution of the Riverside Drive atmosphere. After obtaining an executive order to commence action, the Attorney-General's office moved before the Supreme Court of the United States for leave to sue. The motion was granted. The original papers were duly filed with the court and copy given to the United States marshal for service on the defendants, and such service has been made.

The defendants were the Bulls Ferry Chemical Company, the Midland Linseed Products Company, the Barrett Manufacturing Company, the Valvoline Oil Company and the Corn Products Refining Company.

After a hearing given by the New Jersey State Board of Health to determine the merits of the complaints made by New York State on behalf of the residents of Riverside Drive, the defendant companies were afforded an opportunity to install certain deodorizing apparatus in order to lessen or prevent the pollution of the atmosphere. I was represented at this hearing and submitted proof of the nuisance maintained by the defendants to the injury of the residents on the New York side of the river. The defendants have answered and issue has been joined in each action. At a conference between my representatives and the counsel for the defendants, it was announced that New York State would under no circumstances continue the actions; that if the nuisance was abated as represented, none of the defendants would suffer by the entry of the decree against them.

I am compelled to report now that conditions along Riverside Drive are as bad as ever. This report is predicated upon statements made by residents of that section. It is my purpose to consummate these proceedings in an effort to eliminate this nui-

sance which New York city health officials declare constituted a serious menace to the health of the people residing in that section.

Following the commencement of actions in the Riverside Drive smoke nuisance I received numerous complaints from residents of Staten Island that no consideration or attention had been given by the owners of the plants maintained on the Jersey shore opposite Staten Island to their protests against the pollution of the atmosphere. A condition parallelling the Riverside Drive nuisance existed at this point. The Standard Oil Company and the International Nickel Companies were alleged to be the offending corporations in this instance. The district attorney of Richmond county assured me that he had the information and proof necessary to sustain the actions in the Supreme Court of the United States. He contemplated prior to that time bringing on indictments as a means to compel abatement. These indictments were dismissed, however, by the Appellate Division, Second Department, which pointed out that the proper remedy was in an equity action in the Supreme Court of the United States. I thereupon appeared before the Supreme Court of the United States and obtained leave to sue. Papers were duly filed and the defendants served. After taking this action I was informed by the New York city department of health that it would be a difficult matter to show that the supposed offending corporations are in any way responsible for the fumes which are wafted over to Staten Island. In view of this it is recommended that the State Department of Health again investigate conditions and fix, if possible, the source of the fumes complained of by residents of Staten Island, which are said to have not only caused great discomfort to the residents but to have ruined vegetation in that region. If it shall be determined that these two corporations, the Standard Oil Company and the International Nickel Companies, are responsible for the conditions complained of, I am ready to call into operation every agency at my command to compel these corporations to desist from the pollution of the atmosphere out of which grows this nuisance.

COURT OF CLAIMS

The following typical cases will be sufficient for the purpose of showing the results of the activities of the Attorney-General and his deputies in the defense of claims in the Court of Claims during the year:

	Amount claimed.	Amount awarded.
Acme Engineering and Contracting Co.....	\$281,210 48	\$100,000 00
Adirondack Woolen Co.....	550,150 00	65,000 00
Battle Island Power Co.....	1,200,000 00	3,250 00
Central Dredging Co.....	104,085 99	20,000 00
Central New York Gas and Electric Co.....	59,479 00	Dismissed
Clary, Thomas, et al.....	573,803 03	25,000 00
Columbia Distilling Co.....	125,000 00	Dismissed
Elwell, Wilmot P., and another..	72,487 15	Dismissed
Erie Railroad Co.....	225,000 00	Dismissed
Flushing Bay Development Co....	278,750 00	Dismissed
Genesee Valley Terminal Railroad Co.....	378,908 25	Dismissed
Glenville, town of.....	100,000 00	7,000 00
Goble, Joseph H., et al.....	50,257 45	17,000 00
Grell, Fred H.....	22,000 00	1,000 00
Hinckley Fibre Co.....	{ 1,216,832 78 1,200,000 00 16,832 78 1,000,000 00	175,000 00
Knight, Horace W.....	100,000.00	3,000 00
Levengston, Harry M.....	125,000 00	Dismissed
MacArthur Bros. Co. and Lord Electric Co.....	54,141 91	12,360 43
New York Central and Hudson River Railroad Co.....	1,500,000 00	Dismissed
Pembble, William, and another...	100,000 00	Dismissed
Rochester and Genesee Valley Railroad Co.....	225,000 00	Dismissed
Salmon River Power Co.....	607,550 00	100,000 00
Shelter, Mary, and another.....	66,564 50	19,316 50
Williams, Charles M.....	35,681 00	13,022 40

	Amount claimed.	Amount awarded.
Ballou, Henry C.....	56,833 04	Dismissed
Beeman, Malvina	25,030 00	3,500 00
Hartupee, William D.....	12,500 00	Dismissed
Husband, Clara B., et al.....	75,000 00	21,663 00
Kerwin, Julia, Admrx., etc.....	25,000 00	1,700 00
Maryland Dredging and Contract- ing Co.....	83,172 24	27,500 00
Mohawk Valley Canning Co.....	21,000 00	2,225 20
Ontario Knitting Co.....	50,157 00	2,750 00
Oswego Canal Company, The.....	100,000 00	Dismissed
Weaver, Charles C.....	30,177 34	1,691 00

Attached hereto and made a part hereof is a statement showing all moneys received by me during the year 1916 in payment of costs, damages, etc.; second, the title and subject matter of all actions on appeal pending and undetermined and the condition thereof at the date of this report; third, the actions which have been brought by me during the year for the recovery of real property claimed to be owned by the State, and the condition of such actions at the date of this report; fourth, the title of every action brought by me during the year against any corporation to vacate its charter or annul its existence, and the condition of such actions at the date of this report, with a brief statement of the cause for which such action was brought and the proceedings during the year in such action; fifth, copies of all official opinions rendered by me during the year 1916 which are deemed to be of general public interest.

AGRICULTURAL LAW

The total number of violations of the Agricultural Law referred to this office by the Agricultural Department during 1916 has been.....	1,860
The State has been successful in collecting penalty or judgment in	1,217
Cases discontinued by reason of insufficient evidence, death of defendant, etc.	371
Judgments were rendered against the People in....	24
Number of cases in which judgments have been recovered in favor of the State and which remain uncollected	77
Number of cases on appeal	7
Criminal proceedings brought against defendants..	16
Total number of cases disposed of	<u>1,705</u>
Amount of penalties and costs recovered.....	\$48,870 97
Amount received in satisfaction of judgments.....	<u>4,960 32</u>
Payment to Commissioner of Agriculture, collections on bonds. (Chapter 457, Laws of 1913)..	\$1,455 53
Payment to State Treasurer	<u>52,375 76</u>
Total	<u>\$53,831 29</u>

PROCEEDINGS PENDING IN APPELLATE COURTS

COURT OF APPEALS

Elmira Advertiser Association v. Francis M. Hugo, as Secretary of State of the State of New York. (Action to avoid designation of Elmira Star Gazette to print session laws and confirm designation of Elmira Advertiser. To be argued.)

John H. Wooley, etc., v. Sarah E. Stewart et al. (To compel performance of agreement. To be argued.)

In the Matter of the Claim of Adam Welch for compensation under the Workmen's Compensation Law. The New York, New Haven and Hartford Railroad Company, employer and self-insurer. (Appeal from award of State Industrial Commission. To be argued.)

People ex rel. Joint Lime Company v. William Sohmer as Comptroller of the State of New York. (To review determination of State Comptroller in assessing franchise tax. To be argued.)

People of the State of New York v. Consolidated Gas Co. (Ouster from franchise. To be argued.)

In the Matter of the Claim of Jane Plass for compensation under the Workmen's Compensation Law. The Central New England Railway Company, employer. (Appeal from award of State Industrial Commission. To be argued.)

In the Matter of the Claim of Matthew Lazarick for compensation under the Workmen's Compensation Law. The New York, New Haven and Hartford Railroad Company, employer. (Appeal from award of State Industrial Commission. To be argued.)

First Construction Company of Brooklyn v. State of New York. (Appeal from award of Court of Claims. Argued but not decided.)

In the Matter of the Claim of John Sanders for compensation under the Workmen's Compensation Law. Lehigh Valley Railroad Company, employer. (Appeal from award of State Industrial Commission. To be argued.)

In the Matter of the Claim of John Sullivan for compensation under the Workmen's Compensation Law. Lehigh Valley Railroad Company, employer. (Appeal from award of State Industrial Commission. To be argued.)

In the Matter of the Claim of Fred C. Potts for compensation under the Workmen's Compensation Law. Lehigh Valley Railroad Company, employer. (Appeal from award of State Industrial Commission. To be argued.)

In the Matter of the Claim of Joseph Picol for compensation under the Workmen's Compensation Law. Lehigh Valley Railroad Company, employer. (Appeal from award of State Industrial Commission. To be argued.)

In the Matter of the Claim of Mary V. Saxon for compensation under the Workmen's Compensation Law. Erie Railroad Company, employer. (Appeal from award of State Industrial Commission. To be argued.)

In the Matter of the Claim of Anna Ziegler for compensation under the Workmen's Compensation Law. (Appeal from award of State Industrial Commission. Argued but not decided.)

Metropolitan Trust Company of the State of New York v. State Board of Tax Commissioners of State of New York, and Leonard Ruoff. (To determine validity of mortgage tax. To be argued.)

The People of the State of New York ex rel. John M. Phillips v. Andrew D. Morgan et al., composing the State Hospital Commission. (To review action of commission in removing relator from position of inspector of supplies. To be argued.)

In the Matter of the Estate of Cathelina E. Groot, deceased. (To determine validity of charitable trust. To be argued.)

The People of the State of New York ex rel. Utica Sunday Tribune Co. v. Francis M. Hugo, as Secretary of State. (To review designation of Boonville Herald to publish session laws, etc. To be argued.)

People of the State of New York v. James Heffernan. (Assault. Argued but not decided.)

William G. Barrett and William A. Guinand v. The State of New York. (Appeal from award of Court of Claims for damages to land by beavers. To be argued.)

In the Matter of the Claim of Eugene Glatzl et al. for compensation under the Workmen's Compensation Law. G. E. M. Stumpp, employer; Standard Accident Insurance Company, insurer. (Appeal from award of State Industrial Commission. To be argued.)

In the Matter of the Application of Lehigh Valley Railroad Company for writ of certiorari v. William Sohmer, as Comptroller. (To review determination of State Comptroller in assessing capital stock tax. To be argued.)

People ex rel. Astor Trust Company et al. v. State Tax Commissioners. (To review mortgage tax assessment, mortgage of July 1, 1913. To be argued.)

People ex rel. Astor Trust Company et al. v. State Tax Commission. (To review mortgage tax assessment, mortgage of March 1, 1913. (To be argued.)

In the Matter of the Claim of Lizzie Leslie for compensation under the Workmen's Compensation Law; O'Connor & Richman, Inc., employer; The United States Fidelity and Guarantee Co., insurer. (Appeal from award of State Industrial Commission. To be argued.)

Lowell M. Palmer et al. v. State of New York. (Appeal from determination of Court of Claims. Argued but not decided.)

In the Matter of the Application of Egbert E. Woodbury, Attorney-General, for an order requiring the Home Rule Tax Association to file statement of receipts and expenditures in connection with the general election 1915. To be argued.)

In the Matter of the Claim of Mary Fitzpatrick for compensation under the Workmen's Compensation Law; Blackall & Baldwin Co., employer; the Travelers' Insurance Co., insurer. (Appeal from order of State Industrial Commission. To be argued.)

In the Matter of the Claim of Ida Adams for compensation under the Workmen's Compensation Law; New York, Ontario and Western Railway Company, employer. (Appeal from award of State Industrial Commission. To be argued.)

The People of the State of New York v. The City of Buffalo. (Right to money collected as fines and penalties for violations of motor vehicle law. To be argued.)

The People v. Louis P. Clair. (Appeal from decision of Appellate Division that service of protected game or fish with a meal which is paid for only as a part of board, is not a sale within the meaning of the statute; appeal pending.)

APPELLATE DIVISION — FIRST DEPARTMENT

The People of the State of New York ex rel. Gustave Semmig v. Francis M. Hugo, as Secretary of State of the State of New York. (Mandamus to compel reinstatement as inspector of automobiles in office of Secretary of State. To be argued.)

APPELLATE DIVISION — SECOND DEPARTMENT

The People of the State of New York v. Josiah Felter. (Misappropriation of funds. To be argued.)

The People of the State of New York v. American Sugar Refining Company. (Action to vacate letters patent. To be argued.)

Charles W. H. Arnold as Trustee in Bankruptcy of Bridgeport Construction Company v. William H. Frank, Warner-Quinlan Asphalt Company, Upper Hudson Stone Company et al. (Mechanic's lien on State Highway No. 5369 contract. To be argued.)

The People of the State of New York ex rel. Dennis J. Kelly v. Thomas Mott Osborne as agent and warden of Sing Sing prison. (Mandamus to compel reinstatement. To be argued.)

In the Matter of the Application of Charles R. Uebelmesser for a writ of mandamus against James M. Carter et al., constituting the Board of Parole for State Prisons, State of New York. (Matter of parole. To be argued.)

APPELLATE DIVISION — THIRD DEPARTMENT

The People of the State of New York ex rel. United Natural Gas Company v. William Sohmer, as Comptroller of the State of New York. (Certiorari to review determination of Comptroller in assessing franchise tax. To be argued.)

People ex rel. City of Poughkeepsie v. Henry Solomon et al., constituting the State Commission of Prisons of the State of New York. (Certiorari to review order of State Commission of Prisons closing the jail of the city of Poughkeepsie. To be argued.)

In the Matter of the Application of the Town of Colonie, in the county of Albany, and John N. Carlisle, as State Commissioner of Highways of the State of New York, for a writ of certiorari, etc., v. Seymour Van Santvoord et al., constituting the

Public Service Commission, Second District, re application of the D. & H. Co. for permission to construct tracks, etc. (Certiorari to review determination of Commission re construction of tracks.)

Saranac Land and Timber Company v. James A. Roberts, as Comptroller of the State of New York. Actions Nos. 1 and 2. (To compel plaintiff to give security for costs in connection with actions involving title to forest lands. Appeal from order denying motion of defendant for security for costs.)

In the Matter of the Petition of William J. Wilkins v. Mitchell May, as Secretary of State. (To restrain filing certificate of election. To be argued.)

People ex rel. Fred Bailey et al. v. State Water Supply Commission et al.

People ex rel. Erie Railroad Company et al. v. State Water Supply Commission et al. (Certiorari to review determination of State Water Supply Commission. To be argued.)

West Virginia Pulp and Paper Company of Delaware v. Duncan W. Peck, Individually, and as Superintendent of Public Works, et al. (Injunction to restrain defendant from removing flashboards from dam in Hudson river. To be argued.)

People ex rel. Utica Sunday Tribune Company v. Edward Lazansky et al. (To compel Secretary of State to certify to Comptroller payment of relator for publishing concurrent resolutions for 1910. To be argued.)

In the Matter of the Application of Francis A. Willard for a writ of mandamus v. Lewis F. Pilcher, State Architect. (Action to compel reinstatement as executive secretary in office of Secretary of State. To be argued.)

In the Matter of the Application of James P. Morrissey for a peremptory writ of mandamus v. Edwin Duffey, Commissioner of Highways, et al. (Mandamus to compel reinstatement as division engineer. Appeal from order denying appellant writ of mandamus.)

People of the State of New York v. International Bridge Co. (To enforce penalty for failure to construct roadway on bridge. To be argued.)

In the Matter of the Final Judicial Settlement of the Account of Proceedings of Joseph W. Bewsher as sole Testamentary Trustee of and under the last will and testament of William H. Watson (Sr.), deceased. (Appeal from decree of final judicial settlement, etc. To be argued.)

Standard Computing Scale Company, Ltd., v. John F. Farrell, individually and as State Superintendent of Weights and Measures of the State of New York. (Damages for injury due to defendant's instructions to county sealers re seals made by plaintiff. To be argued.)

The People v. Silas Page. (Appeal from judgment in favor of defendant in action for violation of Conservation Law; judgment reversed, with costs to the defendant. To be argued.)

The People ex rel. The Sidney Water Works Company v. The Conservation Commission of the State of New York and others;

The People ex rel. William H. Pierce and others v. The Conservation Commission of the State of New York, George D. Pratt being Commissioner thereof, and the Village of Sidney. (Matter of application of the village of Sidney, Delaware county, for approval of its plans for the acquisition of a new source of water supply. Determination annulled and matter remitted to the Commission for further consideration.)

The People v. William Payne and Martha Payne. (Appeal from order denying defendants' motion to open judgment and for a new trial in action to determine title to real property. Appeal pending.)

The People v. Walter C. Witherbee et al. (Appeal from order made at Special Term vacating stipulation and judgment. Appeal pending.)

Watervliet Hydraulic Company v. State of New York. Claim No. 10786. (Claim for appropriation of water power and plant of claimant. To be argued.)

Eugene H. Mabee v. The State of New York. (Claim for permanent appropriation, Barge canal. To be argued.)

Richard Lahey v. The State of New York. (Claim for permanent appropriation, Barge canal. To be argued.)

Timothy O'Shaughnessey and John H. O'Shaughnessey v. The State of New York. (Claim for permanent appropriation, Barge canal. To be argued.)

Lane Bros. Co. v. State of New York. (Claim for damages growing out of contract No. 21, Barge canal. To be argued.)

Charles G. Sybrandt v. State of New York. (Claim for permanent appropriation of lands for canal. To be argued.)

The Hudson and Manhattan Railroad Co. v. The State of New York. (Claim for refund for stamps erroneously affixed to stock certificates. To be argued.)

Theodore Zornow v. The State of New York. Claim No. 1046. (Claim for permanent appropriation, Barge canal. To be argued.)

Interborough Metropolitan Co. v. State of New York. (Claim for refund for stamps erroneously affixed to certain certificates of stock which had been transferred. To be argued.)

Milford D. Whedon v. State of New York. (Claim for services as attorney in investigation, trial, etc., in actions growing out of Great Meadow prison matter. To be argued.)

Town of Glenville v. State of New York. Claims Nos. 1559-A and 1560-A. (Damages due to flooding. To be argued.)

Ingalls Stone Co. v. State of New York. (Claim for stone furnished for building New York State School of Agriculture at Canton, N. Y. To be argued.)

John Winn v. The State of New York. (Claim for damage to hay and grass because of leakage, Erie canal. To be argued.)

Peter F. Connolly Co. v. The State of New York. Claim No. 2744-A. (Claim for alleged breach of contract on highway No. 5432. To be argued.)

Charles E. McDonald, as Administrator of the Estate of James W. McDonald, deceased, v. State of New York. Claim No. 1178-A. (Claim for personal injury. To be argued.)

Frank S. O'Neil v. State of New York. Claim No. 2763-A. (Claim for back salary as commissioner of Boxing Commission. To be argued.)

James Y. Gatecomb v. State of New York. Claim No. 1636-A. (Claim for injuries to horse "Gay Audobon" at New York State fair grounds. To be argued.)

George S. Wright v. State of New York. Claim No. 3023. (Claim for pay for overtime services as locktender. To be argued.)

Victoria Konner v. State of New York. (Damages due to change of grade of highway. To be argued.)

Clara Emerson v. The State of New York. (Automobile accident on canal bridge. To be argued.)

John Lynn Emerson v. The State of New York. (Automobile accident on canal bridge. To be argued.)

Malvina Beeman v. The State of New York. (Claim for personal injury due to collapse of bridge over Erie canal. To be argued.)

James Stewart v. The State. Claim No. 1363-A. (Damage to land, overflow. To be argued.)

James Stewart v. The State. Claim No. 1065-A. (Damage to land, overflow. To be argued.)

Charles E. Minton v. The State. Claim No. 1064-A. (Damage to potatoes, overflow. To be argued.)

John Guerin v. The State. Claim No. 943-A. (Damage to potatoes, overflow. To be argued.)

James C. Daly v. The State. Claim No. 942-A. Damage to crops, overflow. To be argued.)

Robert Parker v. The State. Claim No. 917-A. (Damage to crops, overflow. To be argued.)

George Henry v. The State. Claim No. 916-A. (Damage to crops, overflow. To be argued.)

Thomas Meenley v. The State. Claim No. 915-A. (Damage to crops, overflow. To be argued.)

John Hanrahan v. The State. Claim No. 914-A. (Damage to crops, overflow. To be argued.)

Jessie B. Rogers v. The State. Claim No. 895-A. (Damage to crops, overflow. To be argued.)

Fred R. Butterfield v. The State. Claim No. 940-A. (Damage to potatoes caused by overflow. To be argued.)

John I. Munro v. The State. Claim No. 2803-A. (Personal injuries sustained at Kings Park Hospital, being assaulted by patient. To be argued.)

Andrew L. France v. The State. Claim No. 320-A. (Personal injuries while driving over Salina street bridge. To be argued.)

Charles N. Hood v. The State. Claim No. 1557-A. (Damage to personal property, Barge canal contract. To be argued.)

Marcellus & Otisco Lake Ry. Co. v. The State. Claim No. 1335-A. (Damage due to floods, Nine Mile creek. To be argued.)

APPELLATE DIVISION — FOURTH DEPARTMENT

People of the State ex rel. William T. Jordan v. William W. Wotherspoon, as Superintendent of Public Works of the State of New York. (Application for writ of prohibition restraining Superintendent of Public Works from completing canal contract 47-A. To be argued.)

People of the State v. Aikenhead, Bailey & Donaldson, Inc.; United States Fidelity and Guaranty Co. of Baltimore. (Damages for failure to properly complete highway contract, Highway 976. To be argued.)

People of the State of New York v. G. A. Down et al. (Agricultural violation. To be argued.)

William H. Edwards et al. v. People of the State of New York et al. (To establish will. To be argued.)

People ex rel. Mattie Dawson et al. v. Edwin Duffey as State Commissioner of Highways. (Damages for change of highway grade. To be argued.)

CASES IN UNITED STATES SUPREME COURT

Southern Pacific Company v. Marie Jensen. (Appeal from award of State Industrial Commission. To be reargued.)

Southern Pacific Co. v. William Alford Walker. (Appeal from award of State Industrial Commission. To be reargued.)

New York Central Railroad Co. v. Sarah White. (Appeal from award of State Industrial Commission. To be reargued.)

New York Central Railroad Co. v. James Winfield. (Appeal from award of State Industrial Commission. To be reargued.)

Charles Schweinler Press, a Corporation, v. The People of the State of New York, No. 120, October term, 1916. (Violation of Labor Law. Argued but not decided.)

UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT

Standard Computing Scale Co., Ltd., v. John F. Farrell, as State Superintendent of Weights and Measures. (To compel local sealers to seal scales made by plaintiff. Argued but not decided.)

DISTRICT COURT OF THE UNITED STATES

Crescent Mfg. Co. v. Charles S. Wilson, Commissioner of Agriculture of the State of New York. (Injunction to prevent Commissioner of Agriculture from interfering with sale of mapliene. To be argued.)

ACTIONS INVOLVING TITLE TO REAL PROPERTY
BROUGHT UNDER CONSERVATION LAW

Clinton County — People v. Minnie E. Adams. (Action to determine title to real estate. Trial. Judgment for defendant.)

Clinton County — People v. Chateaugay Ore and Iron Company. (Action to determine title to lands and trespass. Trial. Awaiting final submission.)

Delaware County — People v. Jacob T. Brazie; People v. Percy J. Taylor & Ano.; People v. Harvey J. Peaslee & Ano.; People v. Charles W. Mason & Ano. (Actions to determine conflicting claims to real estate. Trial. Judgment for defendants.)

Essex County — People v. Champlain Realty Company. (Action in ejectment. Trial. Judgment for defendant.)

Essex County — People v. Raquette Falls Land Company. (Action to set aside judgment, &c. Trial. Judgment for plaintiffs.)

Franklin County — People v. Cecil V. McArthur et al. (Ejectment action. Discontinued.)

Hamilton County — People v. Thomas Bennett. (Ejectment action. Motion made to vacate judgment. Decision reserved.)

Hamilton County — People v. Phineas C. Lounsbury. (Ejectment action. Disclaimer signed.)

Hamilton County — People v. William Pulling. (Ejectment action. Premises vacated. Action discontinued.)

Hamilton County — People v. Frank Owens; People v. John Rank; People v. Fred Rork. (Ejectment actions. Proofs submitted. Findings to be prepared.)

Hamilton County — People v. Joseph H. Ladew. (Action to determine title to real estate. Trial. Awaiting final submission.)

Hamilton County — People v. Jerome Wood and Anna Wood. (Action to determine title. Motion made to vacate judgment. Motion argued and submitted.)

Hamilton County — People v. Robert Glassbrooks. (Action to determine title. Trial. Awaiting final submission.)

Herkimer County — People v. Mary L. Fisher. (Action to determine the validity of the appropriation by the Forest Purchasing Board of lands in Herkimer County. Trial. Judgment for plaintiffs.)

Herkimer County — People v. Deat S. Harrington, I. Stratton Foster and Edward Smith. (Ejectment action. Stipulation signed that defendants may withdraw answer and plaintiffs may take judgment against defendants for the possession of the premises.)

Lewis County — People v. Henry Purcell, Fred W. Coburn and Fred C. Pierce as executors, etc., of Theodore B. Basselin, deceased. (Action to determine title to real estate. Trial. Judgment for plaintiffs.)

Saratoga County — People v. Levi Dedrick. (Action to determine conflicting claims to real estate. Trial. Decision reserved.)

Warren County — People v. Jerome Hewitt. (Action to determine title to real estate. Trial. Judgment for defendant.)

Warren County — People v. William D. Mann. (Action for possession of real property. Trial. Judgment for plaintiffs.)

Warren County — People v. Clarence L. Collins. (Ejectment action. Trial. Judgment for defendant.)

TITLE ACTIONS PENDING IN SUPREME COURT

Delaware County — People v. Emmett Washburn. (Ejectment action.)

Essex County — People v. Noah LaCasse & Ano. (Action to determine title to real estate.)

Essex County — People v. John Anderson & Mary Anderson. (Action to determine title to real estate.)

Essex County — People v. Rawson M. Hayes & Ano. (Action to determine title to real property.)

Essex County — People v. Finch-Pruyn Co. (Action for waste.)

Franklin County — People v. International Paper Company et al. (Action for partition of lands.)

Fulton County — People v. James C. Livingston, Jr. (Ejectment action.)

Greene County — People v. Agnes A. Vedder. (Ejectment action.)

Hamilton County — People v. Hamlet Whitman. (Ejectment action.)

Hamilton County — People v. Laura Sumner. (Ejectment action.)

Hamilton County — People v. Lowell Fish et al. (Ejectment action.)

Hamilton County — People v. Indian River Co. & Ano. (Action to determine title to real property.)

Hamilton County — People v. Asa Willis. (Ejectment action.)

Hamilton County — People v. Santa Clara Lumber Co. et al. (Action to determine title and accounting.)

Hamilton County — People v. Norton Bird; People v. Francis Haischer; People v. Ezra DeForest; People v. John Blanchard; People v. Lucy Blanchard; People v. Frank Carlin; People v. Charles Hunt; People v. Mattie Jones; People v. Robert B. Kerr; People v. Ralph Profice; People v. H. Robert Beguelin; People v. Daniel Sheehan; People v. Orrin Lamphere; People v. George C. Reardon; People v. George C. Reardon et al.; People v. James Sutliff; People v. Asa Payne; People v. Darius Waldron; People v. Paul Steves; People v. Lucy B. Platt; People v. Elizabeth V. Gooley; People v. Freeland W. Jones; People v. Harrison Lin-

forth; People v. Charles W. Anderson; People v. Reuben M. Mick; People v. Fred Maxam; People v. George Pashley; People v. Beecher Roblee; People v. Andrew Symmes; People v. Harry Symmes; People v. Henry E. Taylor; People v. Daniel B. Wright; People v. Ruby Hall; People v. John Goodro; People v. Marie Bitter et al.; People v. Joseph Grenon; People v. Isaac H. Brownell. (Ejectment actions.)

Ulster County — People v. Delia Hardenburgh et al. (Action to determine and quiet title to real property.)

Warren County — People v. Herbert N. Miller et al. (Action to determine title to real property.)

Essex County — Proceedings before the Comptroller to set aside cancellation of the State's title derived at tax sale; Lot 333; O. M. T., Twp. 11.

Other Conservation Bureau cases will be found listed under the cases in appellate courts.

MISCELLANEOUS ACTIONS AND PROCEEDINGS

- Jan. 3. Supreme Court — Richmond County. Annie Schulman v. Elizabeth Schaefer et al. (Action to register title to real property.)
7. Supreme Court — Hamilton County. Charles E. Snyder v. John F. Lewis, State of New York et al. (Lien — Contract No. 1098 — Highway in Hamilton County.)
8. Supreme Court — Oswego County. Warner-Quinlan Asphalt Company v. The State of New York et al. (Lien — Contract for Road 1245, Oswego County.)
10. Supreme Court — Niagara County. Herbert V. Falk v. J. Allen Smith et al. (Injunction and to appoint receiver of United States Light and Heating Corporation.)
10. Supreme Court — Saratoga County. Michael H. Ryan v. The People of the State of New York et al. (Lien — Repair contracts, Highways 58, 243, 441, 443, 610, 611, 5058, 715.)

- Jan. 13. Supreme Court — Genesee County. Frank Perrelli and Gennaro Perrelli, etc., v. The National Bank of Commerce of Rochester, State of New York et al. (Lien — Improvement of Highway 578-A, Niagara County.)
20. County Court — Niagara County. Edward J. Wehner v. The State of New York et al. (Lien — Repair contract, Highway, town of Pendleton.)
25. Supreme Court — Albany County. In the Matter of the Application of Egburt E. Woodbury for an order requiring the Home Rule Tax Association of the State of New York to file a statement and account of receipts and expenditures in connection with the general election.
26. Supreme Court — Nassau County. Livio Fornari and Romeo Cereoli, doing business under the name of Fornari & Cereoli, v. Charles Heling and John Cahill, State of New York et al. (Lien — Improvement Highway No. 1219, Huntington-Amityville.)
27. Supreme Court — Kings County. In the Matter of the Estate of Annie A. Parker, deceased. (Payment of money from State Comptroller.)
21. Supreme Court — Bronx County. The People of the State of New York ex rel. John Maher v. The Warden of the Bronx County Jail. (Habeas corpus.)
28. Supreme Court — Erie County. Lathrop, Shea & Henwood Company v. W. S. Cooper Company, The McMyler Interstate Company, State of New York et al. (Lien — Construction of lift bridges.)
28. Supreme Court — Erie County. Robert J. Service v. American Buffalo Robe Company et al. (Injunction and appointment of receiver.)
13. Supreme Court — Albany County. The People of the State of New York v. International Bridge Company. (Penalty for failure to construct roadway on bridge.)
22. Supreme Court — Rockland County. The People of the State of New York v. Dunbar Contracting Com-

- pany, Bart Dunn and Joseph J. Fogarty. (Conspiracy to defraud — Highway Contract No. 188.)
- Jan. 26. Supreme Court — Rockland County. The People of the State of New York v. The Aetna Contracting Corporation, William W. Whyard and James Boyd. (Conspiracy to defraud — Highway Contract No. 133.)
26. Supreme Court — Kings County. In the Matter of the Application of the People of the State of New York by Jesse S. Phillips as Superintendent of Insurance, for an order to take possession of the property and liquidate the business of the Clothing Contractors' Mutual Compensation Insurance Company.)
- Feb. 1. Supreme Court — Bronx County. In the Matter of the Bronx Parkway Commission, Petitioner and Plaintiff, to acquire title to lands of Carrie R. Whittaker et al. (Condemnation of lands.)
3. Supreme Court — New York County. Tuttle & Bailey Manufacturing Company v. The Emerson Building Company, Fenmore Iron Works et al. (Lien.)
5. District Court of the United States — Southern District of New York. In the Matter of Glen Island Realty Development Company. (Bankruptcy proceeding.)
7. Supreme Court of the United States, State of New York v. Bull's Ferry Chemical Company. (To abate nuisance, Staten Island fumes.)
8. Supreme Court — New York County. Theodore Cohnfeld v. John A. O'Connor et al. (Payment of money from State Treasury.)
8. Supreme Court — Kings County. The People of the State of New York v. United Freemen's Land Association No. 2. (Dissolution.)
10. Supreme Court — New York County. In the Matter of the Application of Nathan J. Packard and Moses Packard, doing business under name of Packard &

Company, private bankers, for an order directing State Comptroller to transfer certain securities deposited in office of State Comptroller, to petitioner herein.

- Feb. 11. Supreme Court — Westchester County. In the aMatter of the Application of Bronx Parkway Commission, Petitioner-Plaintiff, to acquire title to lands of Robert E. Farley et al., Proceeding No. 2. (Condemnation of lands.)
11. Supreme Court — Erie County. In the Matter of the Application of S. Lunghino & Sons, Private Bankers, for an order requiring the Superintendent of Banks to discontinue possession of the business and property of S. Lunghino & Sons, requiring him to surrender such possession to them.
14. Supreme Court — Clinton County. Fred Champaign, alias Frank Champaign, v. John F. Lewis, Orville Defrees, Harold Defrees, Walter Jacques, Herman J. Williston, The State of New York et al. (Lien — Road repair, Contract No. 707.)
14. Supreme Court — Saratoga County. William H. Lane v. William J. Morrissey, The People of the State of New York et al. (Lien — Repair Contract No. 708.)
15. Supreme Court — Essex County. Walter Jacques v. John F. Lewis, Mark Devlin, The State of New York et al. (Lien — Contracts for road repair, Nos. 707 and 771.)
15. Supreme Court — Saratoga County. William H. Barnett v. William J. Morrissey, The People of the State of New York, The Standard Oil Company of New York, Edward Bush, The Mix Stone Company. (Lien — Repair Contract No. 793.)
15. Supreme Court — Monroe County. Giant Portland Cement Company v. The State of New York et al. (Lien — Highway contract, Niagara county road.)

- Feb. 23. Supreme Court of the United States. State of New York v. Valvoline Oil Company. (To abate nuisance.)
23. Supreme Court of the United States. State of New York Corn Products Refining Company. (To abate nuisance.)
23. Supreme Court of the United States. State of New York v. Midland Linseed Products Company. (To abate nuisance.)
25. Supreme Court — Clinton County. Bluff Point Stone Company v. John F. Lewis, Edwin Duffey, as Commissioner of Highways et al. (Lien — Repair Contract No. 707.)
25. Supreme Court — New York County. In the Matter of the Application of Philip Sugerman et al., doing business as private bankers under the name of The Royal Company of New York, for an order authorizing Comptroller to transfer certain securities, etc.
- March 6. Supreme Court — Monroe County. Concrete Guard Rail Company v. John M. Fitzwater, The People of the State of New York, Geneva National Bank, American Clay-Cement Company and Nitro-Power Company. (Lien — Highway No. 648.)
8. Supreme Court — Monroe County. The R. T. Ford Company v. Albert A. Beaven et al., constituting the Board of Managers of the New York State Custodial Asylum for Feeble-Minded Women at Newark, N. Y. (To correct bid for work at Custodial Asylum.)
9. Supreme Court — Erie County. Empire Limestone Company v. John W. Landel, State of New York et al. (Lien — Highway No. 5560.)
9. Supreme Court — Westchester County. The United States Gas Improvement Company v. Tri-County Construction Corporation and the State of New York. (Lien — Repair Contract No. 821.)

- March 11. Supreme Court — Clinton County. In the Matter of the Application of Thomas F. Conway et al., constituting the Plattsburgh Centenary Commission of the State of New York, to acquire real estate for the People of the State of New York for a site for a memorial to Thomas MacDonough in the City of Plattsburgh.
13. Supreme Court — Chemung County. James McGuigan and William P. Wynne v. Albert Gaffey, The People of the State of New York et al. (Lien — Contract 4812 — Highway No. 5511.)
17. Supreme Court — New York County. Charles W. Dayton et al. v. Alfredo Barili et al. (Register title to real property.)
22. Supreme Court — Westchester County. In the Matter of the Application of Bronx Parkway Commission to acquire title to lands of Frederick W. Kraft et al., Proceeding No. 3. (Condemnation of lands.)
22. Supreme Court — New York County. In the Matter of the Application of Frances Rosencrantz for permission to practice the profession of dentistry in the State of New York.
23. Supreme Court — Schoharie County. The Town of Summit v. The American Surety Company of New York and Harvey B. Dingman. (Conversion of Highway funds.)
23. Supreme Court — New York County. In the Matter of the General Assignment for the benefit of the creditors of Goldstein & Landin, Inc., to Jacob J. Lazaroe.
- April 3. County Court — Erie County. Annie Mathews v. Thomas Neilans et al. (Lien — Contract No. 5407, Athol Springs highway.)
8. Supreme Court — Chenango County. The People of the State of New York v. Bainbridge Progressive Club, Inc. (Dissolution — violation Liquor Tax Law.)

- April 17. Supreme Court — Schuyler County. In the Matter of the Application of Carl Bower et al. for the appointment of commissioners to ascertain the damages sustained by change of grade of street and highway in the village of Burdette.
17. Supreme Court — Schuyler County. In the Matter of the Application of Seth B. Allen for the appointment of Commissioners to ascertain the damages sustained by change of grade of street and highway in the village of Burdette.
17. Supreme Court — Schuyler County. In the Matter of the Application of Eliza A. Secor for the appointment of commissioners to ascertain the damages sustained by change of grade of street and highway in the village of Burdette.
18. Supreme Court — Orleans County. The People of the State of New York ex rel. William E. Karns v. George A. Porter. (Office of Supervisor, town of Albion.)
20. Municipal Court — Bronx Borough, Second District. Joseph L. Brennan et al. v. W. F. Plass and Brother Company, State of New York, Keepsdry Construction Company et al. (Lien — Contract Troop B armory, Albany.)
22. Supreme Court — New York County. In the Matter of the Application of Walter L. Rathbone petitioning on behalf of himself and all of the other citizens of the State who shall join in and contribute to the expenses of these proceedings to review the present apportionment of the State into Senate and Assembly districts.
28. Supreme Court — Erie County. Frontier Contracting Company v. John P. Kelly and LeRoy M. Wheeler, Lackawanna National Bank of Lackawanna and The People of the State of New York. (Sewer contract, Buffalo State hospital.)

- April 28. Supreme Court — Nassau County. Ray J. Reigeluth v. Evergreen Construction Company and The People of the State of New York. (Repair Contract No. 845, Road No. 436.)
28. Supreme Court — Westchester County. Ray J. Reigeluth v. Westchester-Dutchess Corporation and the People of the State of New York. (Repair Contract No. 728, Road No. 35.)
28. Supreme Court — Westchester County. Ray J. Reigeluth v. Tri-County Construction Company and the State of New York. (Repair Contract No. 826, Road No. 865.)
- May 4. Supreme Court — Westchester County. In the Matter of the Application of Bronx Parkway Commission to acquire title to lands of The Watson Realty Company et al. Proceeding No. 4.
4. Supreme Court — Niagara County. C. B. Whitmore Company v. Austin W. Summers and State of New York. (Olcott-Lockport Highway No. 758-A.)
5. Supreme Court — Wyoming County. In the Matter of the State Bank of Pike. (Settlement of account of liquidating agents.)
6. Supreme Court — Oneida County. In the Matter of the Application of Oneida County Bank for an order declaring that the said corporation be closed and its business terminated.
9. Supreme Court — Seneca County. In the Matter of the Application of George B. Clawson as Administrator for order directing County Treasurer of Seneca county, the surplus moneys to credit of Hawes v. Clausen action, etc. (Payment of moneys from treasury.)
12. Supreme Court — Columbia County. Knickerbocker Portland Cement Company v. Cattaraugus Engineering Company, George A. Larkin, Empire Limestone Company, Bessemer Limestone Company, Massachusetts Bonding and Insurance Com-

pany, Wickwire Limestone Company and State of New York. (Road No. 5563, Niagara county.)

- May 12. Supreme Court — Kings County. The People of the State of New York ex rel. Daisy Thompson v. The Agent, Warden or Superintendent of New York State Training School for Girls. (Habeas corpus.)
16. Supreme Court — Albany County. The People of the State of New York v. Dreyfuss Export Company. (Dissolution for failure to pay franchise tax.)
19. Supreme Court — Rensselaer County. Rensselaer Quarry Company, Incorporated, v. William J. Morrissey, The Royal Indemnity Company of New York, State of New York, LaFayette Witherill, The Standard Oil Company of New York, H. A. McRae and Company, Edward Quackenbush, The Adirondack Trust Company, William J. Riley and Rising & Worden. (Repair Contract No. 753, Washington county.)
27. Supreme Court — Kings County. Adolph Freedman v. Morris Jablin et al. (Specific performance of agreement.)
29. Supreme Court — Greene County. Lawrence P. Mingey v. William E. FitzGerald et al. (Dissolution.)
30. Supreme Court — Erie County. In the Matter of the Application of Caroline R. Dean for a writ of habeas corpus to bring up the body of Ethel Dean.
31. Supreme Court — Bronx County. Elizabeth Flynn v. William A. Kenny et al; Mary A. Flynn v. William A. Kenny et al. (Specific performance of contract.)
- June 5. Supreme Court — New York County. A. A. Stoddard Company v. New York Commercial Tercentenary Commission. (Breach of contract.)
5. Supreme Court of the United States. State of New York v. International Nickel Company. (To abate nuisance.)

- June 5. Supreme Court of the United States. State of New York v. Standard Oil Company. (To abate nuisance.)
9. Supreme Court — Kings County. In the Matter of the Application of Jacob A. Livingston to review the alleged apportionment by the Board of Aldermen of the City of New York, of Assembly districts within the county of Kings and within the Fifth senate district.
3. Supreme Court — Albany County. The People of the State of New York ex rel. Park Row Realty Company v. Martin Saxe, Walter H. Knapp and Ralph W. Thomas as State Tax Commissioners and the State Tax Commission of the State of New York. (To review determination of tax on mortgages of relator.)
10. Supreme Court — Westchester County. De Strange Construction Company, Incorporated, v. Central Building Company and State of New York. (Lien — seven cottages, New York State Training School for Boys.)
14. Supreme Court — Kings County. In the Matter of the Application of Richard Young for an order directing the issuance of a writ of mandamus against the Board of Aldermen of the City of New York. (Reapportion Assembly districts, Kings county.)
14. Supreme Court — Kings County. Elizabeth Griffin v. Gottfried Loesche et al. (To quiet title.)
15. Supreme Court — New York County. In the Matter of the Petition of Robert E. Dowling, John J. Hopper, Lawrence M. D. McGuire and John R. Voorhis to review chapter 373 of the Laws of 1916, being the present apportionment of the State into Senate and Assembly districts.
16. Supreme Court — Albany County. In the Matter of the Application of Bigelow-Hartford Company for a writ of certiorari directed to Martin Saxe, Walter

H. Knapp and Ralph W. Thomas as commissioners comprising the State Tax Commission of the State of New York. (To review determination of franchise tax for 1914.)

- June 17. Supreme Court — New York County. In the Matter of the Application of J. B. Greenhut and Company, Bankers, for the return of securities deposited with the Superintendent of Banks of the State of New York.
17. Supreme Court — Erie County. Charlotte Rothenberger v. Charles Wagner et al. (Payment of money from State treasury.)
16. Supreme Court — Albany County. The People of the State of New York v. Southern Surety Company. (To collect on bond of John J. Herlihy Construction Company.)
20. Supreme Court — Kings County. In the Matter of the Application of Jesse D. Moore for an order directing the issuance of a writ of mandamus against the Board of Aldermen of the city of New York.
21. Supreme Court — Kings County. Sedgwick R. Johnson v. Gladys Irene Johnson et al. (Admeasurement of dower and partition.)
22. Supreme Court — Albany County. The People of the State of New York ex rel. Genesee Light and Power Company v. Martin Saxe et al. comprising the State Tax Commissioners and the State Tax Commission. (Ceriorari — To review tax for year ending October 31, 1913.)
22. Supreme Court. In the Matter of the Petition of Richard C. Patterson, Jr., to review chapter 373, Laws of 1916, being the present apportionment of the State into Senate and Assembly districts.
22. Supreme Court — New York County. Kings County Lighting Company v. Egbert E. Woodbury, Attorney-General of the State of New York; Harry E. Lewis, District Attorney for the County of Kings;

Oscar S. Straus et al., composing the Public Service Commission for the first district of the State of New York and the city of New York. (Injunction — Eighty Cent Gas Law.)

- June 24. Supreme Court — Kings County. In the Matter of the Greenpoint Polish Co-operative Savings and Loan Association, in the Matter of the Application of the Superintendent of Banks of the State of New York for an order dissolving, etc., and granting leave to Superintendent to pay a final dividend to creditors.
23. Supreme Court — Clinton County. The People of the State of New York ex rel. Walter Wyatt Hackett Marshall v. John B. Trombly, Agent and Warden of Clinton Prison. (Habeas corpus.)
27. Supreme Court — New York County. In the Matter of the Application of the City Investing Company for a writ of certiorari, etc., directed to Martin Saxe et al. constituting the State Tax Department of the State of New York. (To review tax for year ending October 31, 1915.)
30. Supreme Court — Oswego County. The People of the State of New York v. Neal J. Muldoon. (Violation section 224, chapter 381, Laws of 1915 — Veterinary.)
- July 6. Supreme Court — New York County. Brooklyn Borough Gas Company v. Public Service Commission for the First District; The City of New York; Harry E. Lewis, as District Attorney of the County of Kings; Egbert E. Woodbury, as Attorney-General of the State of New York. (Injunction — Eighty Cent Gas Law.)
7. Supreme Court — New York County. Oscar A. Hirsch et al. v. Independent Electric Light and Power Company, Incorporated, et al. (Appointment of receiver.)
10. Supreme Court — Wyoming County. Eugene M. Travis as State Comptroller v. Hiram Relyea et al. and Aaron R. Smith as surviving administrator

of the estate of Charles L. Seaver, deceased. (Foreclosure of Loan Commissioner's Mortgage No. 483.)

- July 11. Supreme Court — Westchester County. The People of the State of New York ex rel. Charles Price v. George W. Kirchwey, Agent and Warden; Fred Dorner, Principal Keeper, and Dr. Amos O. Squire, Physician at the Sing Sing Prison, constituting board of allowance of commutation under section 236 of the Prison Law. (To compel action upon application for commutation.)
12. Supreme Court — Albany County. The People of the State of New York v. Massachusetts Bonding and Insurance Company. (Judgment, contract of Suffolk Contracting Company, Highway No. 912.)
12. Supreme Court — Albany County. The People of the State of New York v. The Corn Exchange Bank. (Collection of mortgage tax.)
14. Supreme Court. John Adams Gebhardt v. Malot. (Violation section 1480, Penal Law.)
15. Supreme Court — New York County. Phillips Phoenix et al. v. The Trustees of Columbia University, in the City of New York et al. (To determine rights of trustees under will of S. W. Phoenix.)
17. Supreme Court — Albany County. In the Matter of the Application of the Luckenbach Steamship Company, Incorporated, for a writ of certiorari directed to the State Tax Department of the State of New York. (To review determination of tax for year ending October 31, 1914.)
19. Supreme Court — New York County. Lena Rheinheimer v. Apollo Bottling Company et al. (Appointment of receiver.)
20. Supreme Court — Albany County. The Barber Asphalt Paving Company v. Merritt Construction

Company, John L. Hayes as Trustee in Bankruptcy of Merritt Construction Company, Bankrupt, and The State of New York.

- July 22. Supreme Court — Kings County. Elmira Gibbons v. Mary E. Gibbons et al.
25. Supreme Court — Erie County. The People of the State of New York v. Edmund P. Cottle, Florence R. Hill, Robert C. Hill and Evelyn C. Hill. (Recovery of lands and \$4,000 damages.)
25. Supreme Court — Erie County. The People of the State of New York v. Edmund P. Cottle, Jennie W. Cottle, Florence A. Hill, et al. (Recovery of land and damages.)
25. Supreme Court — Erie County. The People of the State of New York v. Edmund P. Cottle, Jennie W. Cottle, Marion W. Cottle, Florence R. Hill, et al. (Recovery of land and \$1,000 damages.)
25. Supreme Court — Queens County. Mary O. Connell v. Adolph Roberts et al.
26. Supreme Court — Erie County. In the Matter of the Application of Mary S. DeGraff to take deposition and perpetuate testimony in relation to the title of certain real estate in the city of North Tonawanda, county of Niagara and the State of New York, pursuant to article 10 of title I, chapter 14, Code of Civil Procedure.
28. Supreme Court — Monroe County. In the Matter of the Application of Fannie E. T. Day et al. for damages v. The Village of Brockport, Monroe county, incurred by the change of grade of Main street, etc.
28. Supreme Court — Rockland County. The People of the State of New York ex rel. Charles R. Uebelmesser v. Thomas Mott Osborne as Agent and Warden of Sing Sing prison. In the Matter of the Application of Charles R. Uebelmesser for a writ of mandamus against James M. Carter et al. constituting Board of Parole.

- Aug. 1. Supreme Court — Rockland County. Frank Kruish, as Executor, v. William Collins et al. (Construction of will.)
2. Supreme Court — Albany County. Bruno J. Franke v. Alfred W. Callahan and Daniel McKenna, doing business under the firm name C. & M. Construction Company; Syracuse Supply Company; William C. Rose and Peter D. Kiernan, doing business under the name of Rose & Kiernan; New York State Bank and the State of New York. (Lien — Fire alarm system, Manhattanville State hospital.)
3. Supreme Court — Livingston County. The Craig Colony for Epileptics v. John W. Fedder. (Maintenance of inmate of Colony.)
3. Supreme Court — Albany County. In the Matter of the Application of Pennsylvania Gas Company for a writ of certiorari to Martin Saxe et al., State Tax Commissioners, and comprising the State Tax Commission of the State of New York. (To review tax for years 1911, 1913, 1914, 1915.)
5. Supreme Court — Bronx County. The People of the State of New York ex rel. Barney Jacobs v. Edward Polak, as register of Bronx county, Samuel H. Ordway et al. as State Civil Service Commission et al. (Mandamus — Salary clerk in register's office.)
5. Supreme Court — New York County. The People of the State of New York ex rel. John F. Gerbrach v. William F. Schneider as clerk of New York county; Samuel H. Ordway et al. as State Civil Service Commission et al. (Mandamus — Position clerk in office New York County Clerk.)
5. Supreme Court — New York County. The People of the State of New York ex rel. Joseph E. Finn v. William F. Schneider, as clerk of New York county; Samuel H. Ordway et al. as State Civil Service Commission et al. (Mandamus — Position clerk in office of New York County Clerk.)

- Aug. 7. Supreme Court — Richmond County. Peter W. Roff et al. v. Ann Roff et al. (Payment of money out of contract.)
11. Supreme Court — Clinton County. Oliver Gebo v. James Conway, Atlantic Refining Company, Incorporated; George A. Weir, Robert F. Nash, Edwin Duffey as Commissioners of Highway, Eugene M. Travis as State Comptroller, and the People of the State of New York. (Lien — Highway Repair Contract No. 822, Road No. 533.)
21. Supreme Court — Albany County. In the Matter of the Application of Charles Freloehr to review the action of the Secretary of State overruling an objection filed against the nomination of Charles S. Whitman and others for State offices under party name of Independence League, etc.
18. Supreme Court — New York County. The People of the State of New York ex rel. Patrick Glennen v. John J. Hopper as register of New York county; Samuel H. Ordway et al. as State Civil Service Commission et al. (Reinstatement as clerk, register's office.)
- Sept. 7. Supreme Court — Albany County. Hovey Benedict v. The New York State Commission of Highways and Edwin Duffey, as Commissioner of Highways of the State of New York. (Injunction to restrain check of plaintiff for \$4,697 on Wells-Spectator Highway No. 5523.)
1. Supreme Court — Niagara County. In the Matter of the Application of George F. Thompson for a review, etc., of designating certificate of Howard C. Townsend for nomination for State senator, forty-seventh district.
16. Supreme Court — Bronx County. In the Matter of the Application of Barnet Sacks for the dissolution of Geesmann & Lozner, Incorporated.

- Sept. 19. Supreme Court — Albany County. Walter J. Campbell v. The Highway Engineering Company, Incorporated; Royal Indemnity Company, The State of New York, Barney Seigel, Edward Powers, George K. Smith and Joseph A. Murphy. (Lien — Highway No. 1258, Long Lake-Tupper Lake.)
21. Supreme Court — Erie County. In the Matter of the Sale of Real Estate of William G. Schrott et al. (Payment of moneys.)
21. Supreme Court — Westchester County. Mary Healy v. The State of New York and Arthur S. Tompkins. (Damages for acts of Justice Tompkins.)
22. Supreme Court — Bronx County. In the Matter of the Application of Bronx Parkway Commission to acquire title to lands of Margaret Thomas et al.
27. Supreme Court — Westchester County. In the Matter of the Application of Bronx Parkway Commission to acquire title to lands of Samuel Scott et al. (Condemnation.)
- Oct. 3. Supreme Court — Clinton County. In the Matter of the Application of the Trustees of the Methodist Episcopal Church of Peru for an order directing for the trust fund under the will of Janett E. Everest may be administered.
4. Supreme Court — Albany County. Sterling Brick Company v. The State of New York, Busch and Percival et al. (Lien — Jamison-East Elma road, Contract No. 925.)
4. Supreme Court — Albany County. United Brick Company v. The State of New York, Busch and Percival et al. (Lien — Jamison-East Elma road, Contract No. 925.)
5. Supreme Court — Rockland County. Belmont-Gurnee, Stone Company, Incorporated, v. J. F. Gallagher and Company, Incorporated; The Barrett Company; Ralph B. Ward et al. as Rockland Motor Haulage Company, village of Hillburn and State of New York. (Lien — Repair Contract No. 933, for Road No. 9000.)

- Oct. 5. Supreme Court — Rockland County. Ralph B. Ward et al. as Rockland Haulage Company v. J. F. Gallagher and Company, Incorporated, The Barrett Company, the village of Hillburn, Belmont-Gurnee Stone Company, the State of New York. (Lien — Contract No. 933, Road No. 9000.)
5. Supreme Court — Rockland County. The Village of Hillburn v. J. F. Gallagher and Company, Incorporated, The Barrett Company, Belmont-Gurnee Stone Company, Ralph B. Ward et al., as Rockland Motor Haulage Company, State of New York. (Lien — Contract No. 933, Road No. 9000.)
5. Supreme Court — Livingston County. Willis E. Delano v. Albert Gaffey, Eugene M. Travis as Comptroller, Edwin Duffey as Commissioner of Highways and State of New York. (Lien — Road No. 1321.)
14. Supreme Court — Greene County. In the Matter of the Application of Martin Saxe et al. as Tax Commission of the State of New York for an order directing the correction or cancellation of the assessment-roll of the town of Hunter, Greene county, N. Y., pursuant to section 173-A of the Tax Law.
19. Supreme Court — Westchester County. Giuseppe Conplitti v. James Garofano and Son, Incorporated; the People of the State of New York et al. (Lien — Road No. 1308, Hawthorne-Pleasantville.)
20. Supreme Court — Albany County. The People of the State of New York v. the Town of Frankfort. (Maintenance of highway.)
26. Supreme Court — Albany County. The People of the State of New York ex rel. Standard Oil Company of New York v. Martin Saxe et al. constituting the State Tax Commission. (Certiorari to review determination of tax for year, October 31, 1915.)

- Oct. 30. Supreme Court — New York County. Peter G. Kemp v. Able Realty Maintenance Company, Incorporated, et al. (Injunction to set aside transfer of assets.)
31. Justice's Court — Suffolk County. The People of the State of New York v. Ralph Dawson. (Violation of Net Weight Law.)
- Nov. 8. Supreme Court — Bronx County. Horatio A. Tiemann v. Lucy Maud Tiemann et al. (Admeasurement of dower.)
10. Supreme Court — Albany County. The People of the State of New York v. Luzerne Chemical Company. (Mortgage tax.)
11. Supreme Court — New York County. In the Matter of the Application of Eugene J. Fraenkell for the dissolution of New Toy Manufacturing Company. (Dissolution.)
14. Supreme Court — New York County. Luis J. Phelps et al. v. Allen W. Evarts et al. (Accounting in dissolution proceeding.)
14. Supreme Court — Livingston County. In the Matter of the Application of Sidney S. Morey for a writ of certiorari directed to the State Conservation Commission. (To review determination re Canaseraga creek improvement.)
15. Supreme Court — Livingston County. In the Matter of the Application of Samuel Barber for a writ of certiorari directed to the State Conservation Commission. (To review determination re Canaseraga creek improvement.)
15. Supreme Court — Livingston County. In the Matter of the Application of William A. Wadsworth for a writ of certiorari directed to the State Conservation Commission. (To review determination re Canaseraga creek improvement.)
16. Supreme Court — Albany County. The People of the State of New York v. Melvin H. Turner, John Lambert, Robert N. Clemons. (Mortgage tax.)

- Nov. 17. Supreme Court — Fulton County. In the Matter of the Application of Mary Coon Edwards for payment of money out of court in an action, John Coon against Carrie Argetsinger et al.
20. Supreme Court — Livingston County. In the Matter of the Application of Florence Leavy for a writ of certiorari directed to the Conservation Commission of the State of New York, and application of Louis A. Hilliard, Jesse and Charles Peterson, Edmond J. Bailor, Eve M. V. Hilliard et al. (To review determination of commission re Canaseraga creek improvement.)
20. Supreme Court — Livingston County. In the Matter of the Application of Joseph T. Knappenberg for a writ of certiorari directed to the State Conservation Commission and application of John Adam Knappenberg; George Hunt. (To review determination of commission re Canaseraga creek improvement.)
24. Supreme Court — Oswego County. Burr E. Cartwright v. George L. Pratt, Sarah A. Pratt, his wife, and Harry L. Stout, as Trustee in Bankruptcy of George L. Pratt. (Injunction of payment for damages, canal lands.)
25. Supreme Court — Westchester County. Francis W. Nuboer et al. v. Mary L. Haight et al. (Construction of will.)
25. Supreme Court — Ulster County. Philip B. Eltinge et al. v. Anne B. H. Innis et al. (Payment of money out of State Treasury.)
25. Supreme Court — Westchester County. The Farmers' Loan and Trust Company v. Salvatore, Prince Brancaccio et al. (Construction of will.)
29. Supreme Court — Kings County. The Swedish Hospital in Brooklyn v. Franklin Morey et al. (To quiet title.)
- Dec. 1. Supreme Court — Westchester County. Raoul W. Baker v. Parker N. Savage et al. (To quiet title.)

- Dec. 4. Supreme Court — Nassau County. In the Matter of the Application of the Trustees of School District No. 13 of the village of Woodbury, town of Oyster Bay, county of Nassau, etc., for authority to use certain funds left them by John J. Hewlett, deceased.
8. Supreme Court — New York County. James O. Clerk v. David H. Van Name et al. (To withdraw money from State Treasury.)
15. Supreme Court — Queens County. Brooklyn Builders' Supply Company v. Jefferson Concrete Company, Incorporated; People of the State of New York et al. (Lien — Construction work, Chronic hospital, Brooklyn State Hospital.)
19. Supreme Court — Suffolk County. The People of the State of New York v. Dayton Hedges. (Conversion of funds of town of Brookhaven.)
20. Supreme Court — New York County. John J. Dillon as Commissioner of Foods and Markets of New York v. James Butler, Incorporated. (To enforce regulations remarking of cold storage eggs.)
20. Supreme Court — New York County. Winfield H. Mapes v. John J. Dillon as Commissioner of Foods and Markets of the State of New York. (Injunction re regulation as to marking cold storage eggs.)
21. Supreme Court — New York County. John J. Dillon as Commissioner of Foods and Markets of the State of New York. (To enforce regulation as to marking of cold storage eggs.)
21. Supreme Court — New York County. John J. Dillon as Commissioner of Foods and Markets of the State of New York v. Frederick F. Lowenfels. (Injunction to restrain selling unstamped cold storage eggs.)
21. Supreme Court — New York County. John J. Dillon as Commissioner of Foods and Markets of the

State of New York v. Charles Spreckles. (Injunction to restrain selling unstamped cold storage eggs.)

- Dec. 21. Supreme Court — New York County. John J. Dillon as Commissioner of Foods and Markets of the State of New York v. Elwood J. Dixon. (Injunction to restrain selling unstamped cold storage eggs.)
21. Supreme Court — New York County. John J. Dillon as Commissioner of Foods and Markets of the State of New York v. Leopold Oppenheim. (Injunction to restrain selling unstamped cold storage eggs.)
21. Supreme Court — New York County. John J. Dillon as Commissioner of Foods and Markets of the State of New York v. Harry Weissberg. (Injunction to restrain selling unstamped cold storage eggs.)
21. Supreme Court — New York County. John J. Dillon as Commissioner of Foods and Markets of the State of New York v. Daniel Reeves, Incorporated. (Injunction to restrain selling unstamped cold storage eggs.)
21. Supreme Court — New York County. John J. Dillon as Commissioner of Foods and Markets of the State of New York v. Union Pacific Tea Company. (Injunction to restrain selling unstamped cold storage eggs.)
22. Supreme Court — New York County. Rosa Appell v. Albert J. Appell Individually and as Executor, etc., et al. (Admeasurement of dower.)
26. Supreme Court — Erie County. Mary H. Clarke v. Aaron L. Porter et al. (To register title to real property.)

APPLICATIONS TO THE ATTORNEY-GENERAL TO
COMMENCE ACTIONS IN THE NAME OF THE
PEOPLE.

(Pending from last year)

- Jan. 6. Application of the City of New York to annul the charter of the Central Railroad of Long Island. (Application granted.)
6. Application of W. W. Farmer for Institution of Proceedings for revocation of permission heretofore given to American Type Founders Company to carry on business in the State of New York. (Application pending.)
17. Petition of United States Light and Heat Company et al. for commencement of action v. Guy M. Walker, A. Stanley Jones and Albert L. Fowle, directors of said corporation. (Application withdrawn.)
- Feb. 3. Application of Stephen L. Hill, to test title of Harry D. Miller, to office of collector of town of Lindley. (Application denied on ground that petitioner has failed to establish by a preponderance of evidence a *prima facie* case for the commencement of an action to try the title to the office.)
11. Application of Samuel Hoffman v. Illinois Surety Company. (Application pending.)
9. Application of William E. Karns v. George A. Porter, to try the title to office of supervisor of the town of Albion, Orleans county. (Application granted.)
8. Application of James W. Redmond v. Lucien S. Bayliss, to test title to office of justice of municipal court of the city of Brooklyn. (Application denied on the ground that a *prima facie* case has not been established.)
2. Application of Melvin R. Ellis and Joseph Ellis Trevor v. The Physicians' Hospital of Plattsburgh, to vacate charter, etc. (Application denied, on the ground that public welfare will be promoted by

denial of application; that court would not allow action to be brought, and action could not be sustained if commenced.

- June 14. Application of Andrew Newcomb v. St. Ann's School of Industry and Reformatory of the Good Shepherd, for violation of section 194 of the Prison Law. (Application denied, on the grounds that private charitable corporations are not within the prohibition of the Constitution and the statutes of the State relative to the employment of inmates of such charitable institutions to do outside work and that such inmates are not prisoners within the meaning of the Constitution and the statutes.)
- May 26. Application of Samuel Rosenthal v. David Cohen Silk Company, for dissolution of said company. (Application denied, but without prejudice to the petitioner to renew the same after the final determination of the action now pending in the Supreme Court, brought by David Cohen Silk Company v. Max M. Horowitz.)
- Aug. 25. Application of George H. Robinson v. Eugene C. Baeck, Hugo Prager and James Prager, under chapter 16, title I, Code of Civil Procedure. (Application withdrawn.)
- July 18. Petition of Martin H. Manion to try title of Peter Joyce to office of Chief of Police of City of Johnstown. (Application denied, on the ground that the mayor acted within his lawful powers when he appointed respondent to the office in question.)
- Nov. 3. Application of Otto H. Goehel v. Consolidated Film Company of New York, for dissolution of said company. (Application granted.)
- Dec. 7. Application of William Quinn, for commencement of action v. Evan R. Evans, to test title to office of Town Clerk of Town of Granville, N. Y. (Application pending.)

ACTIONS AND PROCEEDINGS INSTITUTED AGAINST
STATE OFFICIALS DURING THE YEAR 1916

- Jan. 6. Supreme Court — Westchester County. People of the State of New York ex rel. Vincent Stowe v. George W. Kirchwey, as Agent and Warden of Sing Sing Prison. (Mandamus to reinstate as guard.)
7. Supreme Court — Albany County. In the Matter of the Application of the City of New York for a peremptory writ of mandamus directed to Edward Schoeneck et al., Commissioners of the Land Office, et al. (To compel preparation of statement of assessments for 1915, counties of Bronx, Kings, New York, Queens and Richmond.)
15. Supreme Court — New York County. The People of the State of New York ex rel. George B. Loud v. Samuel H. Ordway et al., as Civil Service Commission of the State of New York. (Mandamus to compel admission to examination for position of assistant court crier.)
18. Supreme Court — Albany County. The People of the State of New York ex rel. The Utica Sunday Tribune Company v. Francis M. Hugo, as Secretary of State of New York, and Garry A. Willard. (Mandamus to review designation of Boonville Herald to publish session laws and concurrent resolutions, Oneida county.)
20. Supreme Court — New York County. The People of the State of New York ex rel. Charles Oppenheim v. Samuel H. Ordway et al., as members of the Civil Service Commission of the State of New York. (Mandamus to enjoin holding examination to provide eligible list of inspectors for State Banking Department.)
- Feb. 4. United States District Court — Southern District of New York. Jay C. Ziegler and Samuel H. Kress,

- etc., v. Carnegie Trust Company, Eugene Lamb Richards, et al. (Injunction to restrain further liquidation of Carnegie Trust Company.)
- Feb. 24. Supreme Court — Albany County. The Albany Orphan Asylum v. Egburt E. Woodbury, as Attorney-General, et al. (For leave to sell city property.)
28. Supreme Court — Wayne County. The People of the State of New York ex rel. Josephine B. Jordan v. William W. Wotherspoon, as Superintendent of Public Works of the State of New York. (Writ of prohibition — Canal Contract 47-A — Lyons.)
28. Supreme Court — Albany County. In the Matter of the Application of the Effman Dairy Company, Inc., for a writ of certiorari v. Charles S. Wilson, Commissioner of Agriculture of the State of New York. (Certiorari — refusal of license to buy milk, etc.)
28. Supreme Court — Albany County. In the Matter of the Application of The Tomkins Cove Stone Company for a writ of certiorari directed to Martin Saxe et al., as the State Tax Commission of the State of New York. (Certiorari to review determination of tax for year ending October 31, 1914.)
- March 4. Supreme Court — Albany County. In the Matter of the Application of James P. Morrissey for a peremptory writ of mandamus v. Edwin Duffey, Commissioner of Highways and head of the Highway Department of the State of New York. (Mandamus — reinstatement as division engineer.)
6. Supreme Court — New York County. The People of the State of New York ex rel. Walter V. Flynn v. Samuel H. Ordway et al., constituting the State Civil Service Commission. (Mandamus to transfer relator from position of typewriter copyist to that of verifier, New York county register's office to commissioner of jurors' office.)

- March 7. Supreme Court — New York County. Benjamin Aymar Sands et al. v. Rhinelander Waldo, Egbert E. Woodbury, as Attorney-General, et al. (Construction of will.)
10. Supreme Court — New York County. The People of the State of New York ex rel. James A. J. O'Brien v. Alfred E. Smith, as Sheriff of the County of New York, et al. (Mandamus to certify payroll of salary for February, 1916.)
18. Supreme Court — Albany County. In the Matter of the Application of New York Stock Yards Company for a writ of certiorari directed to Martin Saxe et al., constituting the State Tax Commission, etc. (Certiorari to review determination for year ending October 31, 1914.)
22. Supreme Court — Albany County. The People of the State of New York ex rel. James Tubridy v. James V. May et al., as Commissioners of the State Hospitals of the State of New York. (Mandamus — payment of wages from Manhattan State Hospital.)
29. Supreme Court — Albany County. The People of the State of New York ex rel. Charles McDonald v. Samuel H. Ordway et al., constituting the Civil Service Commission of the State of New York. (Mandamus — salary of county superintendent of highways, Westchester county.)
- April 7. District Court of the United States — Northern District of New York. Crescent Manufacturing Company v. Charles S. Wilson, Commissioner of Agriculture of the State of New York.
17. Supreme Court — Albany County. The People of the State of New York ex rel. Linn A. E. Gale v. Samuel H. Ordway, Willard D. McKinstry and William Gorham Rice, constituting the Civil Service Commission of the State of New York. (To allow relator to examine papers, special agent State

Tax Department; examination held September, 1915.)

- April 21. Supreme Court — Albany County. In the Matter of the Application of Benjamin J. Boyle for a writ of peremptory mandamus directed to Samuel H. Ordway et al. constituting the State Civil Service Commission, requiring them to certify the pay-rolls of the County Clerk's office of Suffolk county for the months of January, February and March of 1916.
21. Supreme Court — Albany County. In the Matter of the Application of Robert Burns for a writ of peremptory mandamus directed to Samuel H. Ordway et al. constituting the State Civil Service Commission, requiring them to certify the pay-rolls of the County Clerk's office of Suffolk county for the months of January, February and March, 1916.
24. Supreme Court — Westchester County. The People of the State of New York ex rel. James J. Kelly v. George W. Kirchway as agent and warden of Sing Sing prison. (Storekeeper at Sing Sing prison.)
- May 10. Supreme Court — Albany County. The People of the State of New York ex rel. William P. Brennock v. John F. Farrell as State Superintendent of Weights and Measures. (Mandamus for reinstatement.)
20. Supreme Court — Westchester County. In the Matter of the Application of Harry E. Lewis as District Attorney of Kings County v. William Townsend et al., individually, and as the Board of Parole, and John Bassi, known as Clarence Bessey. (To rescind parole granted John Bassi.)
18. Supreme Court. The People of the State of New York ex rel. Emanuel Jackson v. Eugene M. Travis as Comptroller of the State of New York. (Mandamus.)
31. Supreme Court — Albany County. The People of the State of New York ex rel. The Thomas B. Jef-

ferry Company v. the State Tax Department of the State of New York. (To review tax assessed for year ending October 31, 1915.)

- July 11. Supreme Court — Albany County. The People of the State of New York ex rel. Levy Dairy Company v. Charles S. Wilson, as Commissioner of Agriculture of the State of New York. (To compel acceptance of bond and issuance of license.)
19. Supreme Court — Rockland County. Adeline H. Cook et al. v. Egbert E. Woodbury as Attorney-General of State of New York. (Administration of trust under will.)
27. Supreme Court — Albany County. The People of the State of New York ex rel. Frederick W. Heinrich v. Eugene M. Travis as Comptroller of the State of New York. (Examination of accounts of Panama Pacific Exposition Commission.)
28. Supreme Court — Albany County. Standard Computing Scale Company, Limited, v. John F. Farrell, individually and as State Superintendent of Weights and Measures of the State of New York. (Damages for instructions re instruction to county sealer.)
- Aug. 16. Supreme Court — Albany County. Albert O. True v. Lewis F. Pilcher, as State Architect of the State of New York. (Slander.)
- Sept. 28. Supreme Court — Albany County. In the Matter of the Application of Evelyn DeCordova, individually and as executor of Varona de Cordova, deceased, for a peremptory writ of mandamus against Eugene M. Travis as Comptroller of the State of New York. (To compel Comptroller to fix amount of collateral he will approve in connection with payment of tax.)
- Oct. 2. Supreme Court — Oswego County. Northern New York Power Corporation and Niagara, Lockport

and Ontario Company v. William W. Wotherspoon, individually, and as Superintendent of Public Works of the State of New York. (Injunction — Dam No. 6, Oswego river.)

- Oct. 16. Supreme Court — New York County. The People of the State of New York ex rel. Benjamin Alexander v. Eugene M. Travis as Comptroller of the State of New York. (Mandamus)
23. Supreme Court — Albany County. The People of the State of New York ex rel. John J. Sheehan v. Martin Saxe et al. constituting the State Tax Commission of the State of New York. (Reinstate-
ment as confidential agent, Tax Commission.)
- Dec. 5. Supreme Court — Albany County. In the Matter of the Application of John H. Meahl, as County Clerk of the County of Erie for a Writ of Mandamus v. Samuel H. Ordway et al. as State Civil Service Commission.
28. Supreme Court — Albany County. The People ex rel. Town of Eden and Charles H. Ide as Supervisor of the Town of Eden v. State Tax Department of the State of New York. (Four actions. Certiorari to review determination, Erie county equalization for 1911, 1912, 1913, 1915.)

OPINIONS

(FORMAL)

[77]

OPINIONS

(FORMAL)

OPTIONAL CITY GOVERNMENT LAW (L. 1914, CHAP. 444, § 37)—IMPROPER DELEGATION OF LEGISLATIVE POWER—REPEAL OF STATUTE BY ORDINANCE —CONSTITUTIONAL LAW.

The council of the city of Niagara Falls, elected under "Plan C" of the Optional City Government Law (Chapter 444, Laws of 1914) will have no power to change the title of "Overseer of the Poor" to that of "Commissioner of Charities" after January 1, 1916, at which time such new plan of government goes into effect in that city, for the reason that the office of Overseer of the Poor is a public office with governmental functions and hence only the legislature can create, alter or abolish it or prescribe its functions and for the further reason that the legislature cannot secure relief from its duties and responsibilities by such a general delegation of legislative power to the council as is attempted in section 37 of such Optional City Government Law, in that it involves the repeal by ordinance of a statute of the State and the substitution for the judgment of the legislature of the absolute and unlimited discretion of the council as to what the law shall be.

STATEMENT

The city of Niagara Falls has adopted the simplified form of government, known as "Plan C," involving government by limited council with appointive city manager, pursuant to chapter 444 of the Laws of 1914, to take effect January 1, 1916. The charter of the city of Niagara Falls was last generally revised by chapter 300 of the Laws of 1904. The office of Overseer of the Poor under such charter is an elective one. Section 15, subdivision 6 of chapter 300 of the Laws of 1904 provide for the election of Overseer of the Poor for a two-year term, the first incumbent to be elected in November, 1904, and every second year thereafter. Under such provision the present incumbent of that office was elected in 1914 for the years 1915 and 1916. Section 95 of chapter 300 of the Laws of 1904 prescribes the powers and duties of such Overseer of the Poor, and further provides as follows:

"Except as herein otherwise provided, said overseer shall have the same powers and duties, liabilities and responsibilities as overseers of the poor in the towns of Niagara county,

in all matters pertaining to the support and maintenance of the poor of said city, and as to those matters the city shall be regarded as a town of said county."

Section 29 of the Poor Law provides that such Poor Law shall apply to Overseers of the Poor in cities, except where otherwise especially provided by law.

Section 23 of the Optional City Government Law (chapter 444, Laws of 1914) provides that in the event of the adoption of one of the plans of government provided for in such act "the provisions of this act, so far as applicable to the form of government under the plan adopted by the city, shall supersede the provisions of the charter and of the general and special laws relating thereto and inconsistent herewith, but not, however, until officers provided for under such plan shall have been duly elected and their terms of office shall have commenced."

Section 86 of such Optional City Government Law provides that "upon the adoption of Plan C by a city in the method prescribed by this act, such plan shall become operative as provided in section 23 hereof and its powers of government shall be exercised as in this act provided."

Section 90 of such law provides that "the administrative and executive powers of the city, including the power of appointment of officers and employees, are vested in an official to be known as the city manager, who shall be appointed by the council, and hold office during the pleasure of the council."

Section 92 thereof provides that "Such city officers and employees as the council shall determine are necessary for the proper administration of the city shall be appointed by the city manager."

Section 93 thereof provides that "The officers and employees of the city shall perform such duties as may be required of them by the city manager, under general regulations of the council."

Section 37 of such law relates to the effect upon provisions of existing law of the adoption of ordinances regulating the subject matter thereof. In substance this section provides that the city council under any of the plans provided may by ordinance transfer from one officer to another any duties and powers now imposed upon any officer or employee by provision of law, and when all

of the duties of an office have been transferred by any such ordinance such ordinance may abolish the office held by the officer whose powers and duties shall have ceased. It then proceeds to provide that the council shall have power to regulate by ordinance the exercise of any power and the performance of any duty by any officer and that upon the adoption of such ordinance every provision of the charter applicable to such city relating thereto shall cease to have any force or effect in such city. The power thus granted is unlimited except that it is expressly provided that it shall not extend to the regulation of the manner of the granting of franchises, selling real estate or incurring municipal indebtedness or to any provision of law requiring any question to be submitted to the vote of the electors or taxpayers.

A change of title of Overseer of the Poor to Commissioner of Charities is under contemplation by the new council of the city of Niagara Falls, which has been elected under Plan C of such Optional City Government Law.

INQUIRY

Can the council of the city of Niagara Falls elected under Plan C of the Optional City Government Law (chapter 444, Laws of 1914) change the title of the office of Overseer of the Poor to that of Commissioner of Charities after January 1, 1916, at which time such new charter goes into effect, or is it necessary that such change of title be made by act of the Legislature?

OPINION

The office of Overseer of the Poor is not elective under the Constitution. (See Constitution, article X, section 2; People ex rel. Hatfield v. Comstock, 788 N. Y. 356.) The Legislature has thus full authority to dispose of the office. (People ex rel. Furman v. Clute, 50 N. Y. 451.)

The question arises as to whether the Legislature has by statute disposed of the office of Overseer of the Poor in the city of Niagara Falls, by repealing the charter provisions in relation thereto, and if not, whether it has the power to confer the authority upon the council of the city of Niagara Falls to pass an

ordinance disposing of such office, which has been expressly provided for by the charter of such city as well as by the general laws of the State.

The question arises first as to whether the Optional City Government Law (chapter 444, Laws of 1914) has expressly repealed that provision of the charter of the city of Niagara Falls (section 15, subdivision 6 of chapter 300, Laws of 1904) which provides that there shall be an Overseer of the Poor in such city who shall be elected in the even numbered years for a term of two years, the term of office of the present incumbent of which shall not expire until December 31, 1916, together with that provision of section 29 of the Poor Law which provides that that chapter shall apply to overseers of the poor in cities, except when otherwise *specially provided by law*.

The city stands under the Poor Law in the place of the town. (*Nuns of St. Dominick v. Long Island City*, 48 Hun, 306.) Section 95 of the present charter of the city of Niagara Falls (chapter 300, Laws of 1904) provides that as to the powers and duties of its Overseers of the Poor "the city shall be regarded as a town of said county (Niagara county)." The administration of the Poor Laws of the State would seem to be clearly a State function, not a local one. This is indicated by the general law on the subject, by the fact that the city stands under the Poor Law in the place of the town and that by the charter of the city of Niagara Falls itself the office is recognized as not being a city office but that the city is to be regarded as a town of the county.

In construing the so-called Home Rule Bill of 1913 (chapter 247, Laws of 1913) former Attorney-General Carmody wrote an opinion in which, amongst other things, he said:

"There must be borne in mind however the principle which the courts have never lost sight of,—that the legislative power is in the Legislature of the State and that in dealing with cities it can delegate powers of legislation only in respect to those affairs that are purely municipal, that are common to cities and that do not pertain to rights of property or rights of citizenship in the broader sense in which they are defined by our law. In other words, no State function can be delegated by the Legislature to a city."

"Among these things which the Legislature cannot give would undoubtedly be the following, namely: The right to regulate the franchise, the right to control the sale of liquor, the right to regulate the civil service, or any other subject covered by State statutes and common to the whole State or necessary in the exercise of the police powers of the State or in the regulation or control of State sovereignty to be discharged by the whole State." Opinions of Attorney-General of 1913, Vol. 2, pages 377, 378.

Where a subject is covered by the State statutes and common to the whole State, as in the administration of the Poor Law of the State, which is required to be administered in all parts of the State and in which the city stands in the place of the town, and is regarded as a town of the county in which it is located, such a function is a State function. The Court of Appeals has held that the department of education in the city of New York performs a governmental function of the State and in the absence of clear language of the statute to that effect, cannot be deemed a city office. The office of Overseer of the Poor is similarly a public office, with governmental functions, powers and duties and hence only the Legislature can create, alter or abolish it or prescribe its functions. If, in enacting the statute, the Legislature did not itself, upon its own judgment and responsibility, abolish the office of Overseer of the Poor and create the office of Commissioner of Charities, the change cannot be made by any delegated authority. (State v. Butler, 105 Me. 91; 73 Atl. 560; 24 L. R. A. (N. S.) 744.) There has been no express repeal by the Legislature of that provision of the charter which requires an overseer of the poor to be elected for a prescribed term of office and to have certain powers and perform certain duties.

The only provision of the Optional City Government Law which may be deemed in any way to provide for repeal of existing law are found in sections 23 and 37 thereof. Section 23 provides that the provisions of the Optional City Government Law "shall supersede the provisions of the charter and of the general and special laws relating thereto and inconsistent herewith." It is plain that this provision was not intended to be an express repeal

of all charter provisions and of all general and special laws relating to such city, giving to the council of that city the power to develop the entire body of law to be administered within that city by the passage of ordinances. This is seen not only by the use of the words "and inconsistent herewith," the conjunctive "and" showing that these are words of limitation upon the preceding provision, but it is also shown by the provisions of section 37, which permit the modification of existing law by the adoption of ordinances. To give full effect to the intention of the Legislature in this matter all of the provisions of the statute must be read together and each portion must be interpreted in the light of other provisions. It therefore seems clear to me that the provisions of the charter and of general and special laws relating to the city and inconsistent with the Optional City Charter Law, which are deemed to be superseded pursuant to section 23, must be only those provisions which are repugnant to and inconsistent with the election of a council and mayor and the appointment of a city manager as specifically provided in article V of the Optional City Government Law, which provides for the method of city government known as "Plan C." This is borne out by the language of section 23, which provides: "*The provisions of this act, so far as applicable to the form of government under the plan adopted by the city, shall supersede the provisions of the charter, etc.*" In other words, only the existing provisions of law relating to the *form of government* are deemed superseded. If this were not so there would be no occasion for section 37, which provides that certain provisions of existing law shall not be superseded until the council has passed ordinances transferring powers from one officer to another, abolishing offices when all the powers of the officer upon whom they are now conferred have been transferred to another, and providing that the council shall have power to regulate the exercise of powers and duties by ordinances which shall supersede the existing charter provisions.

Therefore it is clear that the provision of section 23 was not intended to cover the whole subject of the repeal or superseding of any existing provisions of law but was plainly intended to be limited in its scope, and therefore the existing provisions of law with

reference to the election of Overseer of the Poor in the city of Niagara Falls cannot be held repealed by necessary implication. There are well known rules of construction that a later statute which is general does not repeal a former one that is particular and that the courts do not favor constructive repeal. It is only in cases where the repugnancy is clear and manifest and the two statutes cannot be reconciled or stand together that the rule of repeal by implication can be applied. (Mark v. State, 97 N. Y. 572, 578.) In fact, the plain intention of the Legislature seems to be to provide a general form of government outlined only by a council, mayor and city manager, and giving to them the power to determine what other officers and employees are necessary for the proper administration of the city, prescribing their duties and passing ordinances superseding any existing charter provisions regulating any of such matters. The word "supersede" as used in this connection must be given the force and effect of "repeal," as that is plainly what would be accomplished by permitting the council to supersede any existing provisions of law.

We have seen that there has been no express repeal of the charter provisions requiring an Overseer of the Poor; that there has been no repeal of such provisions by necessary implication and that since the function is a State function the power cannot be delegated by the Legislature to the city to regulate it even though the existing provisions of law had been repealed. It may even be said that section 29 of the Poor Law takes it for granted that there shall be an Overseer of the Poor in every city and that one must be provided in every city unless otherwise specially provided by law. It cannot be said that provision has been provided *otherwise specially by law*. I am therefore constrained to hold that the council of the city of Niagara Falls will have no power to pass a valid ordinance superseding, repealing or otherwise modifying any existing provision of law relating to the office of Overseer of the Poor in that city, which would include the change of title of the office from Overseer of the Poor to that of Commissioner of Charities. To recognize the principle even to the extent of change of title would be a recognition of the principle itself, and would leave room to contend that the council without

check or guidance could veto the entire Poor Law in its relation to that city and decide that its benefits shall never be extended to any case within that city. The law must be judged by what is possible under it.

Moreover, there is another reason for denying the power of the council to make the change suggested. This objection runs to the very theory which underlies the optional city government plan as provided in chapter 444 of the Laws of 1914. I am compelled to express the belief that the Legislature has exceeded its powers in its general delegation of legislative power to the council to supersede, repeal or modify the provisions of existing law by the passage of ordinances. This objection is irrespective of whether an ordinance of the council relates to an officer charged under the existing law with the performance of a State function. It runs even to a case where such an officer performs a purely municipal function.

The last expression of opinion by the Court of Appeals on the subject of delegation of legislative powers is found in the case of *People v. Klinck Packing Co.*, 214 N. Y., at pages 138-140. In that case the Court of Appeals was passing upon the constitutionality of that provision of the Labor Law known as "the one day of rest in seven law." While holding that the original act was constitutional the court declared that the amendment of chapter 396 of the Laws of 1914, which gave to the Commissioner of Labor the power to exempt employees in his discretion was unconstitutional because of the attempt which the Legislature made to delegate its powers to the Commissioner of Labor. Judge Hiscock, in writing the opinion of the court, says:

"The proposition is so well settled that we need not cite authorities in its support that the Legislature cannot secure relief from its duties and responsibilities by general delegation of legislative power to someone else. It seems to us that that is precisely and broadly what is here attempted. The provision as a whole means that certain employees shall be exempt if the Commissioner of Labor 'in his discretion approves.' " (Laws 1914, chapter 396.)

"The question whether the statute shall take effect in any, all or no cases is left wholly to his volition. Under its terms he has the power without check or guidance, so far as we can perceive, to veto the entire clause and decide that its benefits shall never be extended to any case although it comes within the precise terms of the statute, or to permit the exemption in one case and deny it in another precisely similar one. Of course it is not to be assumed that the commissioner of labor would intentionally be arbitrary and unreasonable in the exercise of this power, but nevertheless the Legislature has attempted to confer upon him the opportunity which would permit of these shortcomings, and we are to judge of a statute by what is possible under it. In the absence of any guide it might very well happen that an administrative officer with the best of purposes would nevertheless be very fallible in the execution of them."

Former Attorney-General Carmody in his opinion on the Home Rule for Cities Law of 1913, chapter 247, had occasion to pass upon a provision which was somewhat similar to the provisions of the Optional City Government Law with respect to the power of the council to determine what officers and employees are necessary for the proper administration of the city and to prescribe their powers and duties. He said:

"I do not overlook subdivision 17 of section 20, which apparently gives to cities the right to determine and regulate the number, mode of selection, terms of employment, qualifications, powers and duties and compensation of employees of a city and the relation of all officers and employees of the city to each other, to the city and to the inhabitants thereof. This must be taken to refer to ordinary employees as distinguished from officials appointed or elected under the city charter. Certain it is this Home Rule bill does not intend (*and such power would be ineffectual if attempted to be granted*) to allow cities to regulate the number, mode of selection, terms of employment, qualifications, powers and duties and compensation of aldermen and members of

various municipal boards or all other officials charged under the charter with the performance of official municipal duties."

Opinions of Attorney-General 1913, Vol. 2, page 380.

He concludes at page 382 of his opinion that the power of the Legislature to confer home rule is not complete "until the constitutional limitations are removed from the Legislature so that it may grant cities certain powers of legislation, namely — to make charter amendments, to regulate the method of selection and to fix the compensation and duties of city officials, to organize and regulate the powers of purely municipal bodies and to do whatever act may be properly classified as a municipal act which is not an invasion of the rights of citizenship or of property which the State itself in its sovereign capacity must regulate."

The Legislature itself may abolish an office or shorten the term thereof unless it is an office created by the Constitution. (*Koch v. The Mayor*, 152 N. Y. 75.) The Legislature may abolish an office and confer its functions upon other officers. (*Greaton v. Griffin*, 4 Abb. [N. S.] 310). The constitutional provision (article III, section 1) vesting legislative power in the Senate and Assembly does not prohibit the Legislature from delegating to inferior governmental bodies or to the people of limited localities powers and functions which though legislative in form are in their nature administrative rather than strictly and exclusively legislative. (*Stanton v. Board of Supervisors*, 129 N. Y. 428, affirming 112 App. Div. 877.) But the Legislature cannot delegate any power which is inherently or exclusively legislative. (*People v. Klinck Packing Co.*, 214 N. Y. 121; *Matter of Trustees of Village of Saratoga Springs v. Saratoga Gas, Electric Light and Power Co.*, 191 N. Y. 123; *Wayman v. Southard*, 10 Wheaton, 1.)

The true test as to whether a power is strictly legislative or whether it is administrative and merely relates to the execution of the law, frequently quoted, is expressed by Ranney, J., in *Cincinnati W. & Z. R. Co. v. Clinton Co. Commrs.*, 1 Ohio St. 88, as follows:

"The true distinction * * * is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or dis-

cretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter, no valid objection can be made."

The Legislature cannot authorize a municipal corporation to repeal by ordinance a statute of the State. (*Haywood v. Savannah*, 12 Ga. 404; *Dexheimer v. Orange*, [N. J. 1897] 36 Atl. 706). In the latter case an act was passed permitting the consolidation of offices. It was sought by ordinance of the common council to consolidate the offices of street commissioner and city engineer by abolishing the office of street commissioner, which had been created by statute. The court said:

"That this statute attempts to delegate to the common council the law making power and is therefore in disregard of that article of the State Constitution which declares that the legislative power shall be vested in a senate and general assembly, seems clear."

It has been held that the Legislature has no power to delegate to the Governor authority to "create" an office. (*State v. Butler*, 105 Me. 91; 73 Atl. 560; 24 L. R. A. [N. S.] 744.) The court said that "whether the creation of the office is necessary or expedient, its duties, its powers, its beginning, its duration, its tenure are all questions for the Legislature to determine and be responsible to the people for their correct determination." In *Gilhooly v. Elizabeth*, 66 N. J. L. 484; 49 Atl. 1106, a statute providing that "upon the petition of not less than 100 voters of any city, the Governor may in his discretion appoint a commission" to divide the city into wards, was held unconstitutional as being an attempt to delegate legislative power to the Governor. The court criticized the act for giving the Governor an absolute and unlimited discretion, controlled by no rule, to be exercised in accordance with no facts to be ascertained by him, and upon no principle or terms of expediency declared by the Legislature. Many other cases could be cited holding statutes invalid where it was sought to delegate a power involving a discretion as to what the law shall be.

Under this Optional City Government Law, the new council of Niagara Falls is permitted to create offices and abolish offices

now existing by statute, according to its own absolute and unlimited discretion. It can nullify the laws of the State by the creation of new offices and the abolition of existing ones. A Commissioner of Charities may even be created for the purpose of blocking the enforcement of the laws by a faithful Overseer of the Poor. True, no such action is to be anticipated and no doubt the Legislature assumed the statute would be used only for the better enforcement of the laws, but it could be used to defeat enforcement and effectually, if the statute be valid. The test is, what could be done, not what probably or undoubtedly would be done. (People v. Klinck Packing Co., 214 N. Y. 139.)

Another way of stating the test as to the validity of the delegation of legislative power is with reference to the completeness of the statute as it appears when it leaves the hands of the Legislature. This rule has been so well stated in Dowling v. Lancashire Ins. Co., 92 Wis. 63; 65 N. W. 738; 31 L. R. A. 112, that it has frequently been quoted. The court said:

“The result of all the cases on the subject is that a law must be complete in all its terms and provisions when it leaves the legislative branch of the government and nothing must be left to the judgment of the electors, or other appointees or delegates of the Legislature, so that in form and substance it is a law in all its details *in praesenti*, but which may be left to take effect *in futuro*, if necessary, upon the ascertainment of any prescribed fact or event.”

The Optional City Government Law attempts to overcome the difficulties in the way of providing a uniform charter for cities of the third class, and which have thus far proved insurmountable, by the provisions of section 37 thereof. In substance, this section provides that the city council under any of the plans provided may by ordinance transfer from one officer to another any duties and powers now imposed upon any officer or employee, and when all the duties of an office have been transferred the office shall be deemed abolished. It then proceeds to provide that the council shall have the power to regulate by ordinance the exercise of any power and the performance of any duty by any officer and that

upon the adoption of such ordinance every provision of the charter of the city relating thereto shall cease to have any force or effect in such city. The only limitation provided as to such power is the proviso that such power of regulation by the council shall not extend to provisions regulating the manner of providing franchises, selling real estate or incurring municipal indebtedness or to any provision of law requiring any matter to be submitted to the vote of the electors or taxpaying.

The effect of this section is to delegate to the council of the city the power to repeal so much of the existing charter as it sees fit, so far as the same relates to the exercise of powers or the performance of duties by any officer. This would cover practically the whole of the city charter and just how far it would go would depend upon the judgment and discretion of the council and not of the Legislature. The question whether the existing charter shall take effect in any, all or no cases is left to the volition of the council without either check or guidance. As was said by the Court of Appeals in *People v. Klinck Packing Co., supra*, the Legislature cannot secure relief from its duties and responsibilities by such a general delegation of legislative power to someone else.

It cannot be said that the Legislature did not really mean to attempt to delegate the power of repeal, for the purpose of the Legislature so to do is shown unmistakably by the language of the act itself. For instance, in section 37 this language is used:

“Until superseded, as hereinbefore provided, all provisions of law regulating the exercise of the powers and the performance of the duties of officers and employees of any city shall continue in full force and effect.”

And again in the same section the following language is used:

“But the provisions of law regulating the exercise of such powers or the performance of such duties, shall, subject to being superseded as hereinbefore provided, continue in force, etc.”

Again in the same section it is provided:

"But nothing herein contained shall be deemed to authorize the repeal or superseding of any provision of law regulating the manner in which or the conditions subject to which franchises may be granted, * * * and nothing herein contained shall be deemed to authorize the repeal or superseding of any provision of law requiring any matter to be submitted to the vote of the electors or taxpayers."

So that there is little room to contend that the Legislature did not intend to delegate to the council of the city the power to repeal the whole or a part of an act of the Legislature, namely—the existing city charter. I am convinced that this cannot be done.

It has of course been decided that a city or village may be permitted to accept a charter submitted by the Legislature but the legislative action must be complete and final. I see no objection to the submission to a city, for its acceptance, of a charter as such. My objection runs to any attempt to delegate to the council of such city the power to say which part of the existing charter shall be retained and which part of it rejected.

That this cannot be done I think the language in the prevailing opinion in the Bronx county case (*People ex rel. Unger v. Kennedy*, 207 N. Y. 533) clearly demonstrates. On page 541, Judge Hiscock writing the opinion of the court says:

"The most forceful way in which the proposition of unconstitutionality can be stated is that adopted by Mr. Justice Ingraham in the prevailing opinion at the Appellate Division. It is there reasoned by him that the Legislature in effect provided that the act creating the new county should take effect at once and then by the provision just quoted, enacted that the law *might be repealed* by or as the result of popular vote, and he assumes, of course with entire accuracy, *that no court has ever held that the Legislature could delegate to popular vote the right thus to repeal a statute.*"

After reviewing the act in question in that case and construing it to provide not for a repeal but for the submission of the question

as to whether the act should become operative and its provisions carried out, Judge Hiscock on page 543 uses this language:

"By this interpretation we are brought to the broad and fundamental question whether the Legislature may by statute intended to be complete and taking effect at once provide for the future erection of a new county and then permit the voters within the proposed territory before the date of actual creation to decide by vote whether the provisions of said statute shall be carried out and become operative."

Again, on the same page:

"It (the statute) did not attempt to delegate to the voters the right and duty to determine whether the proposed enactment should become a law. While the line of distinction between delegating to voters to say whether an enactment shall become a law and delegating to them to say whether the law shall become operative might at times be a narrow one, it is one which is distinctly recognized by the cases hereinafter to be considered."

After reviewing several authorities Judge Hiscock on page 549 sums up the principle, as follows:

"The principle governing each case is that the Legislature having discharged its duty by framing and enacting a completed legislative plan and statute affecting the people of a limited locality may then leave it to them to say whether they do or do not desire to take advantage of the law thus passed."

A similar question arose at the time the general village law was first enacted. That law permitted the electors of any village incorporated under special act to determine what sections of the general act for the incorporation of villages shall apply to their village. It was urged there that the effect of that provision was to enable the electors of a village to repeal the special law or amend it. It was held, however, to be valid and constitutional, that it was not the delegation of legislative power but a tender to these municipalities of such specified amendments to their respective charters as they might elect to accept. The court said:

"I perceive no difference whether the statute submits an entirely new charter or amendment to an existing one to the constituency to be acted. *Either way the legislative action is complete and final* and the vote of the municipality is simply a determination of the expediency of their accepting *the result of that action.*" Bank of Chenango v. Brown, 26 N. Y. 467 at page 475.

It is plain that the real principle underlying both of the cases cited is that the Legislature may enact a *complete* statute using its own discretion and its own judgment as to what it shall contain, and thereby perform the function imposed upon it by the Constitution, and may also provide with reference to the local statute that it shall not be operative if disapproved by the electors. It seems plain that the question depends not so much upon the distinction between repeal and operative as it does upon the fact that the Legislature is to exercise its judgment in the first instance as to what shall be or shall not be contained in the law. In that way, it does not surrender its judgment to any other body.

So far as existing city charters are concerned they are acts of the Legislature. It makes no difference whether they contain provisions which the Legislature might in the first instance have delegated the power to enact to the local council. The answer to that is the Legislature did not delegate the power in the existing charters but made its own special provisions, and now by this general bill framed in the most general language an attempt is made to delegate to the local councils the power to say what part of those acts of the Legislature shall remain the law of the State and what part shall not. The Legislature has no supervision over the exercise of that judgment, and it seems to me that the Optional City Government Law very clearly violates the principle laid down in the cases cited.

There is no doubt but that the Legislature can delegate to municipalities the power to make local laws upon certain subjects. (Clarke v. City of Rochester, 28 N. Y. 605.)

In the case cited, the court says:

"I do not say that it can be submitted to the electors of a city or village to determine what powers its local legislature

shall possess but only that these bodies may be made the depositories of such powers of local government as the Legislature may see fit to prescribe and the exercise of which is not repugnant to any of the general arrangements of the Constitution."

The distinction is clear. The Legislature must exercise its judgment and specify what powers it will give and what it will not give so far as local legislation is concerned. When it does grant such a power it does not pretend to legislate upon subjects within that power at all, *but it must specify the limits of the powers.* The Optional City Government Law violates both principles. The Legislature does not specify what powers the council may provide for by regulation. It exercises no judgment in that behalf but attempts to say that the council may regulate the exercise of any power of any officer of the city. Furthermore, so far as the city charters already in force are concerned the Legislature has already specified *by its own act* what the powers and duties of these officers shall be and what limitations shall be placed upon them, but the Optional City Government Law attempts to delegate to the local council the power to say which part of the judgment of the Legislature shall be retained and which part of it rejected. It seems to me perfectly clear that these provisions are unconstitutional.

Dated January 11, 1916.

EGBURT E. WOODBURY,

Attorney-General.

To LOUIS ELMER, Esq., Overseer of the Poor, Niagara Falls, N. Y

HIGHWAY LAW; SECTION 93 OF THE HIGHWAY LAW.

A railroad bridge and its abutments constructed for an overhead crossing of the railroad by a State or county highway, is to be constructed and maintained by the railroad, but the roadway thereover and the approaches thereto are to be maintained and kept in repair by the State as provided by section 93 of the Railroad Law.

INQUIRY

A difference of opinion has arisen between the State Highway Department and the town authorities of the town of Owego in the county of Tioga, as to whether the State or the town of Owego is liable for maintenance and up-keep of some five spans of bridge work at the southerly end of a bridge over the Susquehanna river and the D. L. & W. railroad tracks at Owego, N. Y.

OPINION

Prior to 1881, there existed a toll bridge in the town of Owego across the Susquehanna river. By chapter 380 of the Laws of 1881 provision was made for the purchase of the bridge by the town for the purpose of converting it into a free bridge, and by subsequent vote of the town the proposition was carried and the bridge then became the property of the town, and has since been maintained by the town except as hereinafter stated.

In 1893-4 it became necessary to build a new river bridge. At the south end of the bridge ran the D. L. & W. railroad which was then crossed at grade, and when it became necessary to construct a new bridge across the river the railroad company agreed to contribute \$13,000 provided the grade crossing was eliminated. This necessitated an entire change in the construction of the new bridge, the raising of the track over the river, and then extending the same grade over the railroad, and the construction of five new spans, one 44 feet, 11 inches long over Lackawanna avenue, and four spans of 21 feet each, varying in height until they connected with the earth fill at the south end on a newly acquired highway. This arrangement was carried out and the new bridge constructed accordingly; and the grade crossing was thus eliminated.

No question is made by the town as to its liability for the maintenance of the portions of the bridge north of the span which crosses the D. L. & W. railroad, and the railroad company

concedes its liability for the maintenance and up-keep of the span and abutments covering its tracks. The sole question involved in this opinion is whether the State or the town of Owego is liable for the maintenance of the bridge or spans over Lackawanna avenue and the four spans of 21 feet each lying between the above railroad bridge and the end of the gravel road.

This bridge is on the route that was designated as a State road, route No. 4, in section 120, chapter 330, Laws of 1908, and when that portion of such road was let for construction, being Contract No. 5215, it commenced at the abutment at the extreme southerly end of said bridge, as the State Highway Department has always maintained that the State is not liable for any of the expenses connected with the up-keep and maintenance of any portion of such bridge or any of its piers or abutments.

Under the Highway Law, section 2, subdivision 5, a highway "shall be deemed to include necessary culverts, sluices, drains, ditches, waterways, embankments, retaining walls and all bridges having a span of five feet or less."

The spans of this bridge all exceed five feet, and the expense of maintaining the same is clearly and concededly a town charge unless such liability was shifted by the provisions of section 93 of the Railroad Law, upon the State, by reason of the bridge forming a connecting link upon a State highway, which has been improved as provided in article VI of the Highway Law.

By chapter 754 of the Laws of 1897, sections 60 to 69 inclusive, were added to the Railroad Law, providing for the elimination of grade crossings so far as practicable, and section 64 provided, among other things, that when a highway crossed a railroad by an overhead bridge, that the frame work of the bridge and its abutments should be maintained and kept in repair by the railroad company and the roadway thereover and the approaches thereto should be maintained and kept in repair by the municipality in which the same was situated.

This section was amended by chapter 140 of the Laws of 1902, but the amendment is not material to the consideration of the question involved in this inquiry.

The section was again amended by chapter 64, Laws of 1909, by adding thereto the following provision:

“In case such highway is a part of a State or county highway, constructed or improved as provided in article VI of the Highway Law, the roadway over such railroad or the subway underneath the same, and the approaches thereto shall be maintained and kept in repair under the supervision and control of the State Commission of Highways in the manner provided by the Highway Law for the maintenance and repair of State and county highways.”

This amendment took effect on the 5th of April, 1909, and in the consolidation of the laws became Section No. 93.

Article VI of the Highway Law above referred to was a part of the general highway revision as passed by chapter 330 of the Laws of 1908, which took effect on January 1, 1909, and provided for the construction and maintenance of State highways, and by such act route No. 4, upon which this bridge is located, is described and classified as a State highway.

The decision of this question turns upon the construction of the word “approaches” as used in the statute.

It has been held that approaches to a bridge are a part of the bridge itself.

Witcher vs. Somerville, 138 Mass. 454.

Carpenter vs. City of Cohoes, 81 N. Y. 21.

Hayes vs. N. Y. C. & H. R. R. Co., 9 Hun, 63.

Jackson, Attorney-General Reports, 1908, 241.

Carmody, Attorney-General Reports, 1914, 285.

These cases, however, are easily distinguishable from the question before me, for in such cases either the statute or contract under discussion simply referred to a “bridge” and the courts held that the approaches were a part of the bridge, but under section 93 of the Railroad Law, the abutments and frame work of the bridge are to be kept in repair by the railroad company, while the approaches to the bridge were formerly to be kept in repair by the municipality, and now by the State where the bridge is upon either a county or State highway, so it follows that it was clearly

intended by the Legislature that the approaches should not be considered a part of the bridge, but should be subject to entirely different supervision and different parties are liable for the up-keep and maintenance of each and as long as the statute makes a clear distinction between the bridge and the approaches thereto of an overhead crossing of a railroad by a highway, it becomes necessary to examine closely into the subject of approaches.

If the five spans in question are to be considered as bridges, or a part of the bridge, then the State is not liable for the maintenance of the same, but on the contrary, if they are to be treated simply as an approach to the bridge, then the State is liable, as the term "approaches" must be construed in the light of the purposes for which the statute was enacted.

"When applied to the subject matter of a railroad crossing, the word "approaches," as it is commonly used and understood, has a like signification and meaning; it means the embankments or *bridges* or grades or *structures* of any sort, on each side of the railroad crossing which serve as the passageway for approaching the crossing."

City of Bloomington vs. Ill. Central R. Co., 154 Ill. 539.

"The word is to be given its ordinary meaning. It is common knowledge what an approach is to a bridge on a highway. It is simply that prepared or made condition on each side of the bridge that makes a safe, easy and convenient way to get across the bridge. The words "approaches thereto" within their respective rights of way are words of limitation rather than extension."

Town of O'Fallon vs. Ohio & M. Ry. Co., 45 Ill. App. 572, 578.

By a New Jersey statute the word "approaches" is defined as follows:

"'Approaches' of a bridge are whatever is necessary to connect the bridge with the public road or streets, either at

the end thereof, or to make such roads or streets conform to the grade of the bridge."

Kearney Tp. vs. Ballantine, 23 Atlantic, 821.

My predecessor, Carmody, in an opinion relating to "Klock's Crossing" on route 6, where much the same condition existed (Rep. 1912, p. 233), except that the opinion does not disclose whether the approaches consisted of bridges, elevated roadways or earth fills, but at page 234 of such opinion, after quoting the whole of section 93 of the Railroad Law, makes use of the following language:

"The statute quoted substitutes the State in place of the municipality where the highway is part of a State highway. The railroad is, therefore, in my opinion, liable for the maintenance and repair of this bridge, except the roadway and approaches thereto which should be maintained and kept in repair by the State in the same manner as State highways."

The five spans in question must be treated as the approach to the southerly end of the railroad bridge, and are therefore, brought clearly within the provisions of section 93 of the Railroad Law, and plainly this section makes a clear distinction between a "bridge" and an "approach" and the approaches therefore cannot be treated as a part of the bridge.

It was clearly the intent of the Legislature to place the expense of construction and maintenance of all bridges having a span of over five feet, upon the municipalities (article IX, Highway Law), and the liability remained upon such municipalities until the amendment of section 64 (now 93) of the Railroad Law, which was passed in 1909, and still remains upon such municipalities unless such bridge or bridges form and constitute the approach to an overhead railroad crossing upon a State or county highway; and it is equally clear that by the passage of section 93 of the Railroad Law, the Legislature intended to transfer the maintenance of all such approaches from the municipalities to the State upon all State and county highways.

The amendment of the Railroad Law in 1909 is the last utterance of the Legislature upon the subject of approaches to an over-

head crossing of a railroad by a State or county highway, and if there is any conflict or inconsistency between the two acts, the last one must be held to prevail.

Lyddy vs. Long Island City, 104 N. Y. 218.

Stack vs. City of Brooklyn, 150 N. Y. 235, 345.

It was held in *City of Yonkers vs. N. Y. C. & H. R. R. Co.*, 165 N. Y. 142, that the application of section 93 of the Railroad Law was not limited in its application to railroads constructed subsequent to its enactment, but applies to all bridges constituting the highway at railroad crossings whether constructed before or after the law went into effect; and the same rule would apply in reference to the amendment of 1909.

I am therefore of the opinion that the maintenance and up-keep of the approach on the southerly end of the bridge in question is imposed upon the State by section 93 of the Railroad Law, and the same is to be maintained and kept in repair under the supervision and control of the State Commission of Highways in the same manner and from the same funds provided by the Highway Law for the maintenance of State and county highways.

Dated January 21, 1916.

E. E. WOODBURY,

Attorney-General.

To Hon. EDWIN DUFFEY, *Commissioner of Highways, Albany, N. Y.*

WORKMEN'S COMPENSATION LAW (CHAP. 41, LAWS 1914, § 95)—POWER OF STATE INDUSTRIAL COMMISSION TO CREATE A GROUP CONSISTING OF AN INDIVIDUAL EMPLOYER, FOR RATING AND DIVIDEND PURPOSES.

The only way in which a single employer in the State Insurance Fund can be separately grouped by the State Industrial Commission for rating and dividend purposes, under section 95 of the Workmen's Compensation Law, is where the nature of his business and the degree of risk of injury is such that he, in fact, represents a group by himself; subject, however, to the opportunity of other employers in the State Fund who come within its limitations to be made members of that group; and the only way in which a single employer in such State Fund can secure a rate different from that allowed to other employers in such fund of the same group is through a system of schedule rating which takes into account the peculiar hazard of each individual risk. But, for dividend purposes, even an employer so rated still remains in the group in which he is placed and dividends must be declared as the result of the total experience of the group of which he is a member for the premium period.

INQUIRY

Can the State Industrial Commission, under section 95 of the Workmen's Compensation Law (chapter 41, Laws of 1914), in rearranging the groups set forth in section 2 thereof, set up an individual employer in a separate group?

STATEMENT

It appears that there are certain employers in the State having a very large and varied group of employees. The State Industrial Commission using the power conferred by section 95 of the Compensation Act to rearrange groups, has in some instances set up such an individual employer in a separate group, upon the theory that the word "group" may be defined or construed for purposes of administering the State Insurance Fund as properly applicable to an individual employer having a pay-roll exposure sufficiently large to afford a satisfactory insurance distribution. It is the practice in declaring dividends to credit to such an individual employer constituting such an individual group, any balance of his premium remaining after paying all losses on his account, and after setting up the loss reserves and catastrophe surplus required by section 97 of the act. This dividend is credited upon the next installment of premium due the State Fund. My opinion is asked whether this is permissible under the act.

There is no definition of the term "group" in the act. For the purposes of sections 95 and 97 and from the point of view of

insurance administration, the commission seems to construe the word "group" as meaning an insurance unit. They say:

"The test of what constitutes an insurance unit is to be found not in the number of employments or employers in any case, but in the amount of the pay-roll exposure. For purposes of administering the State Insurance Fund, it is not proper to recognize as a 'group' any number of employments or any number of employers, whose total pay-roll exposure is too small to afford a satisfactory insurance distribution. On the other hand, it is entirely proper to set up as a 'group' within the meaning of the act, any individual employment or any individual employer with a pay-roll exposure sufficiently large to give a satisfactory insurance distribution. In determining what amount of pay-roll exposure shall be taken as affording a satisfactory insurance distribution, the rule adopted by the State Insurance Fund calls for a pay-roll of approximately twenty-five hundred employees, or an expenditure of about twenty thousand dollars per week. Any line drawn here must be of necessity somewhat arbitrary, but it is generally recognized by actuaries that a pay-roll exposure representing twenty-five hundred employees, or twenty thousand dollars per week is sufficiently large to yield a proper insurance distribution. In other words, any individual employer or any number of employers in the same trade, having a pay-roll exposure of this size, constitutes what may be termed a real insurance unit. This is recognized by the provisions of the Insurance Law governing the formation of mutual companies which lays down as one of the conditions for the formation of such a company, a pay-roll of at least twenty-five hundred employees. I submit that this interpretation of the word 'group' as meaning an insurance unit composed of either a number of employments or employers, or consisting of a single employment or employer with a sufficient pay-roll exposure to afford a satisfactory insurance distribution, is a reasonable and proper one, especially in view of the absence of any definition of this term in the act, and the precedent

established by the official interpretation placed upon the word 'group' as used in a similar provision of the Massachusetts Act."

THE STATUTE

The following are the provisions of the statute (Workmen's Compensation Law) which bear upon the subject of grouping:

"Section 2.

"Compensation * * * shall be payable for injuries * * * incurred by employees engaged in the following hazardous employments:

Group 1. The operation, including construction and repair of railways operated by steam, electric or other motive power, street railways and incline railways * * *."

(This section then goes on to divide the hazardous employments subject to the law into 42 groups, each being numbered consecutively.)

Section 90.

"There is hereby created a fund, to be known as 'The State Insurance Fund,' for the purpose of insuring employers * * *. Such fund shall consist of

all premiums received and paid into the fund."

"Such fund shall be applicable to the payment of losses sustained

on account of insurance

* * * in the manner provided in this chapter."

Section 95.

"Classification of Risks and Adjustment of Premiums.

Employers * * * shall be divided, for the purposes of the State Fund, into

the groups set forth in section two of this chapter."

"Separate accounts shall be kept * * * in respect to each such group

for convenience in determining
equitable rates."

Section 95.

"But, for the purpose of paying compensation,

the State Fund shall be deemed one and indivisible.

“The commission shall have power

to rearrange any of the groups set forth in section two,”

“by withdrawing any employment embraced in it and transferring it wholly or in part

to any other group,”

“and from such employments to set up

new groups

at its discretion.”

“The commission shall determine the hazards of the
different classes composing each group”

“and fix the rates of premiums therefor based upon the
*total pay-roll and number of employees in each of such
classes of employment*

at the lowest possible rate consistent with the maintenance of a solvent State insurance fund and the creation of a reasonable surplus and reserve;”

“And for such purpose may adopt a system of schedule rating in such a manner as to take account of the peculiar hazard of

each individual risk.”

Section 97.

“Requirement in classifying employment and fixing and adjusting premium rates.

1. The commission shall keep an accurate account of the money paid in in premiums

by each of the several classes of employments and industries.”

“and the disbursements on account of injuries and deaths
of employees thereof.”

“And also on account of the money received from
each individual employer.”

“and the amount disbursed * * * on account of * * *
such employer.”

“2. On January first, nineteen hundred and fifteen,
* * * a readjustment of the rate shall be made for
each of the several groups of employments or industries

and of each hazard class therein,'
“ which, in the judgment of the commission,
shall have developed an average loss ratio.”

“ 3. If any such accounting show an aggregate balance
(deemed by the commission to be
safely and properly divisible.”)
“ remaining to the credit of
any class of employment or industry,”
“ The commission may in its discretion credit
*to each individual member of such group * * **
such proportion of such balance as the amount of
his prior paid premiums
sustains to the whole amount of such premiums
paid by the group to which he belongs,
since the last readjustment of rates.”

OPINION

The Commission seems to feel that the establishment of individual groups in the State Insurance Fund is in the interest of the safety and solvency of the fund, and for the benefit of all employers and employees insured in it, and that large employers of labor are thereby induced to take insurance in the State Insurance Fund in preference to carrying their own risks as self-insurers. The Commission claims that it is of benefit to not only the employers so grouped, but also the State Insurance Fund as a whole, and the other employers insured in it since it increases the financial strength and stability of the fund by enlarging its premium income, its loss reserves and its catastrophe surplus, and reduces the cost of insurance to every policy holder by lowering the proportion of overhead charges falling upon the individual employer. It is said to be of advantage, also, to the employees of policy holders placed in individual groups, as it furnishes the strongest possible incentive to improve the safety equipment of plants.

That the language of section 95 is very broad, conferring upon the Commission large powers to combine and rearrange groups, to divide and subdivide employments, to transfer any employment wholly or in part, to any other group set forth in section 2, and

from such employments set forth in section 2, to set up new groups at its discretion, is undoubted. Moreover, assuming for the purpose of argument, that the language of the statute is broad enough to imply authority for the Commission to create such a plan of individual grouping, the question of its expediency and advisability, regarded from the point of view of business policy and insurance economics, is one that must obviously be determined by the judgment of the Commission. I am concerned only with the legality of such a method. If the Commission holds it to be sound and wise to set up individual employers in separate groups, the attitude of the Commission should be sustained, if the language of the act may reasonably be construed as conferring or implying authority for such action.

It will be seen that sections 95 and 97, bearing on the classification of risks and the fixing and adjusting of premium rates and the declaring of dividends, treat employers who are insured in the State Fund from three different standpoints, namely, that of a "group," that of a "class" and that of an "individual."

Etymologically the term "group" means two or more things having some relation to each other. Words in a statute must be deemed to have been used in their ordinarily accepted meaning, unless the contrary can be shown to appear from the context. Therefore, the very use of the word "group" standing alone, would seem to indicate an intention of the Legislature that there should be more than a single individual employer in any "group," unless the nature of his business is such that he is the only one transacting business of that kind within the State, or unless the peculiar hazard of his business is such as to make it susceptible of a separate classification; but in either event, whether from the standpoint of the nature of the business, or the degree of risk of injury, it would seem that the "group" idea could only be carried out, within the ordinary meaning of that term, by making the classification available to all employers coming within the limitations thereof. The Legislature has exemplified the "group" idea in section 2 of the act and, in the absence of definition, it would seem that nothing less could be conveyed by the use of the word "group" in section 95 than is concretely illustrated in section 2. [For example, if the Commission, for State Fund purposes, should create a group of

which all employers of a certain class might become members, and only one of them should insure in the State Fund, this would be a "group" within the meaning of the statute. The grouping would consist in the classification whereby the door would be open to all employers of the same class having the same hazard to come in at any time and enjoy the same classification and receive the same treatment.]

This view is strengthened, rather than otherwise, when we consider the context. The statute uses the word "class," as well as "group." Section 95 mentions "classes composing each group" and "such classes of employment." Evidently classes were intended to be subdivisions of groups. Similar phrasing is used in section 97, namely, "each of the several classes of employment or industry," and "any class of employment or industry;" while, what a "class" is is pretty clearly indicated by the use of the word "hazard class" in subdivision 2 of section 97.

Really, then a "class" within the meaning of this statute is a part of a "group" and must be, in an insurance sense, composed of employments having the same hazard.

That these classes are to be made up of individual employers having the same hazard, if more than one such employer exists and is insured in the State Fund, seems clear from the language of section 95, providing that "the commission shall determine the hazards of the different classes composing each group," and from the use in subdivision 3 of section 97, of the words "each individual member of such group." This subdivision, having to do with dividends, indicates that dividends must be paid by group, rather than class, and that as a member of a group, his dividend is limited to such proportion as the amount of his prior paid premiums sustains to the whole amount of such premiums paid by the group to which he belongs.

That classes may, *in effect*, be made up of individual employers seems clear from the last sentence of section 95, namely, for the purpose of fixing rates of premiums. The Commission is permitted to fix the rates of premiums, based upon the total pay-roll and the number of employees in each of the classes composing each group and "may adopt a system of schedule rating in such a manner as to take account of the peculiar hazard of each individual

risk." In other words, the Commission is permitted to discriminate in the making of rates, but the nature of so doing is not arbitrary, but is presumed to take into account some hazard, or protection against some hazard, as for example, the number and variety of employees, as giving a special experience for insurance purposes, and the amount of safeguard preventatives of accident, adopted as part of the equipment or system of an employer, and which might justly entitle him to be classified as a separate class or risk, because of his peculiar hazard, and because he really represents at the time a class within a group.

The law thus seems to permit the Commission to create new groups, but each group should be available to all employers coming within its limitations, and if a group is divided into classes, each class should be available to all employers within the group, who come within its limitations. To make an individual a group or class by himself, the Commission should be able to point to the peculiar hazard of the individual risk which justifies its separation as such.

If the Commission can justify any of its individual groupings upon the above basis, I can see no objection from the standpoint of its legality. If, however, the Commission find it necessary, upon the above basis, to place any such individual employer in a class within a group, the law seems to prevent the payment of a dividend to such an individual employer based solely upon his own experience and the cost of carrying his own insurance plus the amount credited to the surplus and reserve fund. There would seem to be no illegality, however, in the Commission fixing the original premiums, and adjusting later premium rates to accomplish the same result by basing the rate upon the peculiar hazard, to be determined in the first instance by each peculiar hazard, or protection against such hazard, namely, in accordance with the total pay-roll, the number of employees, safety appliances, system and so forth, and later to be determined upon such elements together with the average loss ratio experienced in connection with such individual risk.

It is therefore my opinion, that the only way in which a single employer in the State Fund can be separately grouped is where the nature of his business and the degree of risk of injury is such

that he, in fact, represents a group by himself, subject, however, to the opportunity of other employers coming within its limitations to be made members of that group; and the only way in which a single employer in the State Fund can secure a rate different from that allowed to other employers in such fund of the same group is through a system of schedule rating, as provided in the last sentence of section 95. But, for dividend purposes, even an employer so rated still remains in the group in which he is placed and dividends must be declared as the result of the total experience of the group of which he is a member for the premium period.

Dated, January 26, 1916.

E. E. WOODBURY,

Attorney-General.

To STATE INDUSTRIAL COMMISSION, Albany, N. Y.

MILITARY LAW, §§ 178-180, 193, 198 — RENTAL OF ARMORY FOR NAVAL MILITIA.

Where money is raised under section 198 of the Military Law to make temporary provision for rental of a new armory it should be borrowed by the county treasurer, paid to the State Treasurer, appropriated by the Legislature, and disbursed by the Treasurer on the warrant of the Comptroller upon the certificate of the Armory Commission.

INQUIRY

The secretary of the State Board of Armory Commissioners has requested an opinion with regard to the method to be pursued in procuring funds necessary for the payment of rent for a building in the city of Buffalo, which the commission desires to rent for use as an armory for the naval militia station in that city.

OPINION

Section 176 of the Military Law, as amended by chapter 558 of the Laws of 1913, provides as follows:

“ § 176. BRIGADE DISTRICTS. For the purpose of constructing, renting, altering, repairing, enlarging, equipping, furnishing and maintaining armories outside of the city of New York for the use of the organized militia, the territory of the State outside of the city of New York shall be divided

into two districts, one to be known as the third brigade district and the other as the fourth brigade district. For said purposes * * * the fourth brigade district shall be composed of and comprise the following named counties:

* * * Erie * * *."

Section 177 of the Military Law, as amended by chapter 290 of the Laws of 1915, provides as follows:

"§ 177. EXPENSES OF ARMORIES, EQUIPMENT AND MAINTENANCE A CHARGE ON THE COUNTIES OF THE BRIGADE DISTRICT IN WHICH LOCATED.—The expenses of erecting, altering, repairing, enlarging, renting, equipping, furnishing and maintaining armories, * * * shall be a charge upon the counties composing the brigade district within the bounds of which is located any arsenal or armory occupied by the national guard or naval militia, and when apportioned as in this chapter provided, shall be levied, collected and paid in the same manner as other county charges are levied, collected and paid."

Section 178 of the Military Law, as amended by chapter 558 of the Laws of 1913, provides as follows:

"§ 178. ASCERTAINING, APPORTIONING AND COLLECTING FUNDS FOR ARMORY PURPOSES.—The officers required to approve the annual estimate of officers in charge and control of armories outside of the city of New York shall annually, during the month of September in each year, file, with the armory commission of the brigade district in which such armories are located, a certificate, showing the amounts required by the several armories of the district for the next fiscal year. The armory commission shall, during the month of September in each year, determine the amount required for the next fiscal year for the construction, alteration, repair, enlargement, renting and equipping armories within said brigade district. The amount so certified to the commission and the amount so determined by it for the purposes aforesaid shall be a charge upon the several counties of the brigade district and, during the month of October of each

year, shall be by said armory commission apportioned among such counties according to the aggregate amount of assessment for each county within the brigade district as fixed by the state board of equalization. The armory commission shall, during the month of October in each year, certify to the comptroller of the state the amount each county within said brigade district shall pay and also the amounts required for the maintenance of each armory of the brigade district, and to what county treasurers such amounts are to be transmitted when collected, and the amount to be retained by the state treasurer to the credit and subject to the order of the armory commission of the district. On or before the first day of November of each year, the comptroller shall mail to the county clerk and to the chairman and clerk of the board of supervisors of each county a statement of the amount each county shall pay and such amount so certified to the several counties shall be a portion of the county charges of each of such counties and shall be levied and collected and paid as other county charges are levied, collected and paid. Such amounts shall be paid by the several county treasurers into the treasury of this state on or before the fifteenth day of May following, to be held by the treasurer and disbursed by him as follows: On or before the first day of June in each year the comptroller shall draw his warrants on the state treasury in favor of the several county treasurers of the brigade district, for the amount required for the maintenance of each armory of the brigade district as certified to him by the armory commission and the amounts required shall be transmitted to the several county treasurers designated by the armory commission to receive the same, which amounts shall be expended for the maintenance of the several armories as provided for in this chapter. The amount raised for the construction, alteration, repair, enlargement, renting and equipping armories within each district shall be paid upon the warrant of the comptroller, upon the certificate of the armory commission for the purposes hereinabove specified. The armory commission in preparing its certificate to be presented to the comptroller shall deduct from the amount re-

quired by the estimate of the officer in charge and control of any armory, as approved, such balance as the treasurer of the county where such armory is located may have certified to be in his hands to the credit of such armory maintenance fund remaining from the appropriation of the preceding fiscal year. The fiscal year, for the purposes of this chapter, shall begin on the first day of July and end on the thirtieth day of June of the succeeding year."

Section 179 of the Military Law, as amended by chapter 558 of the Laws of 1913, provides as follows:

"§ 179. ARMORY COMMISSION TO FURNISH ARMORIES. Whenever it shall appear by the certificate of the commanding officer of the national guard or of the naval militia that an organization of his command has at least the minimum number of enlisted men established by law who legally can be required to perform the duties prescribed thereby, the armory commission of the brigade district in which such organization is located, shall * * * in case of the naval militia upon the demand of the commanding officer of the organization thereof, approved by the commanding officer of the battalion to which it belongs or is attached and of the commanding officer of the naval militia, or if such organization is not part of a battalion upon the approval of the commanding officer of the naval militia alone, erect or *rent* and equip within the boundaries of such brigade district, for the use of such organization, a suitable and convenient armory, drill room and place of deposit for the safe keeping of the arms, equipment, accoutrements, uniforms and military property furnished under the provisions of this chapter. The size, suitability and convenience of such armory, drill room, place of deposit and the suitability and convenience of the equipment shall be determined * * * in the case of the naval militia by the commanding officer thereof."

Section 189 of the Military Law, as amended by chapter 162 of the Laws of 1914, provides as follows:

" § 180. ARMORIES AND HEADQUARTERS: HOW PROVIDED FOR OR CONSTRUCTED. Whenever the armory commission shall deem it expedient that an armory be provided for the use of one or more organizations of the national guard or naval militia * * * the armory commission of the brigade district in which such organization or organizations or headquarters is located shall, except when such accommodation is provided in a state arsenal, erect or *rent* and equip in such brigade district a suitable and convenient armory * * *"

Section 193 of the Military Law, as amended by chapter 290 of the Laws of 1915, provides as follows:

" § 193. ANNUAL ESTIMATE FOR MAINTENANCE. The officer in charge and control of an armory outside of the city of New York shall, on or before the first day of September in each year, prepare and submit for approval * * * in case of an organization of the naval militia, to the commanding officer of the naval militia, an itemized estimate in quadruplicate, of the necessary expenditures to be made for labor and the utensils, materials, means and supplies necessary and required for the next fiscal year for the cleaning, care, proper keeping, maintenance and preservation of the armory or portion thereof used or occupied by the organization therein quartered, the repairing of the lavatories, bath, wash and water closets, and the apparatus and fixtures for heating, lighting and ventilating said armory, and the heating, lighting, water supply and telephone service in and for said armory and the utensils, means, materials and supplies necessary and required for the care, proper keeping, maintenance, repair and preservation of the arms, uniforms, harness, wagons, equipments, books, papers, records and furniture used and kept by such organization in said armory and the camp stools, chairs, desks, cases, and the tools, appliances, facilities and furnishings necessary for and required in such armory. The expenses above enumerated shall be deemed the cost of maintenance within the provisions of this chapter. Upon the approval of such estimate, it shall be filed as follows: One

copy with the adjutant general of the state; one with the officer approving the same; one with the armory commission and one at the armory. * * * The county treasurer of such county shall, on the first day of September in each year, file with the armory commission a report in detail showing the amounts paid or contracted to be paid during the preceding fiscal year for or on account of each armory located in said county and specifying the balance remaining in his hands of the moneys appropriated for said fiscal year, including the accumulated interest thereon which will not be required to meet outstanding obligations contracted during said fiscal year."

Section 198 of the Military Law, as amended by chapter 162 of the Laws of 1914, provides as follows:

"**§ 198. TEMPORARY PROVISION FOR A NEW ARMORY OR ADDITIONAL EMPLOYEES.** In case additional armories are established or additional employees employed, pursuant to the provisions of this chapter, for the expense of which no moneys have been collected for the fiscal year in which said armory was established or said employees employed, the officer in charge and control of said armory shall prepare and submit an estimate of cost of maintenance or of such additional labor as provided in section one hundred and ninety-three of this chapter, for the remainder of said fiscal year, and the armory commission shall, if necessary determine the amount required as directed in section one hundred and seventy-eight of this chapter. The county treasurer of the county in the bounds of which such armory is established or employees employed is hereby authorized and required to borrow on the faith and credit of his county the amount specified in such estimate and the amount so determined as aforesaid and to issue certificates of indebtedness therefor, payable on or before the first day of July, following the next first day of September, with interest at a rate not exceeding six per centum per annum. The amount borrowed by said county treasurer with interest thereon shall be included by the armory commission in its next certificate to the comptroller of the state, and shall be

paid to the county treasurer as provided in section one hundred and seventy-eight of this chapter."

Sections 176 to 178 provide for a scheme for the distributing of expenses of construction; equipment, maintenance and rental of armories, among the various counties of brigade districts. Section 176 defines "districts." Section 177 provides that expenses shall be a charge upon the counties. Section 178 provides for ascertaining, apportioning and collecting funds, the arrangements being that on estimates made by officers in charge, the armory commission shall in September of each year, determine the amount required for the fiscal year beginning July 1st, next following. Sections 179 and 180 make it the duty of the armory commission to furnish armories under stated circumstances. Section 193 provides for an annual estimate for maintenance to be made by the commanding officer and to be included in the determination of the commission under section 178. Section 198 makes provision for temporary expenses of new armories or additional employes added during a fiscal year for which estimates have already been made. The expense of maintenance and labor as provided in section 193 is determined by the officer in charge, and then provision is made that "the armory commission shall, if necessary, determine the amount required as directed in section 178 of this chapter." This can only mean that the armory commission shall determine the amount "required for * * * the construction, alteration, repair, enlargement, renting and equipping armories," as that is the only determination which the armory commission is empowered to make under section 178 referred to.

Section 198 provides that the county treasurer shall raise the money by borrowing it, but since there is no other direction for the disposition of the money once raised, it must follow the rule laid down in section 178. So much of it as is required for maintenance should probably be retained by the county treasurer to be expended as provided in section 193, but so much as is to be used for rental, etc., since it can only be disbursed by the state treasurer on the warrant of the comptroller upon the certificate of the armory commission it must necessarily be paid into the state treasury before it can be disbursed.

As pointed out in the opinion rendered on December 23, 1913 (Report of Attorney-General, 1913, vol. II, p. 703), moneys once having been paid into the state treasury can only be disbursed after an appropriation has been made by the Legislature.

It follows that the method to be pursued in procuring funds necessary for payment of rent (prior to July 1, 1917), for a building in the city of Buffalo, is to have a determination by the armory commission made of the amount required for rent, as directed in section 178; to notify the county treasurer; to borrow such amount and pay same to the state treasurer; to have the appropriation made by the Legislature, and to have the same disbursed by the state treasurer upon the warrant of the comptroller upon the certificate of the armory commission.

Rent to be paid after July 1, 1917, may be provided for in the determination of the armory commission under section 178, to be certified to the comptroller in October, 1916, and similarly from year to year thereafter.

E. E. WOODBURY,
Attorney-General.

Dated, February 5th, 1916.

To Hon. FRANKLIN W. WARD, *Secretary, State Board of Armory Commissioners.*

HIGHWAY LAW, SECTION 130.

A contractor is bound by the final estimates of work as determined by the division engineer in charge, and if such contractor refuses to sign a final special agreement balancing the actual quantities with the estimated quantities stated in the proposal, taking care of and adjusting all increases or decreases, the final amount found due to such contractor can be paid to an assignee of such contractor upon the full completion of the work and final acceptance thereof by the State Highway Commission, without the signing and execution of any further or final agreement relating to such work by such contractor.

INQUIRY

In the event of a contractor, who has assigned all moneys due or to become due to him under a contract for the construction or repair of a State or county highway, refusing to sign a final agreement relating to the actual quantities of work, and balance due upon the final completion and acceptance of the work by the State

Highway Commission, can such Commission pay over to the assignee of such contractor the amount found due upon the final completion thereof without the signing and execution by such contractor of a final statement and agreement relating to such work and contract.

OPINION

It appears that it has been the practice of the Highway Department upon the completion of contracts for the construction or repair of a State or county highway to have the Division Engineer make careful and accurate measurements of the amount of work which has been performed, and upon such measurements a final statement and agreement is made balancing the actual quantities with the approximate quantities stated in the original proposal, taking care of increases and decreases and stating the accurate balance due the contractor or his assignee. This final contract is signed by the parties and forms the basis for the final payment and settlement of the job. A contract has been recently completed and the Division Engineer has made his final measurements and prepared a final special agreement covering all increases and decreases, but the contractor refuses to sign the same. The contractor has made an assignment of all moneys falling due under the contract, and there are also liens on file against such moneys so that none of it is payable to the contractor. The contractor now refuses to sign the final special agreement unless he receives compensation for doing so, and evidently believes that unless he signs such special agreement that neither the assignee of any lienor will be able to obtain such final payment or any part thereof.

This final agreement has been considered as quite desirable by the Highway Department as it fixes the price for new work, adjusts all increases and decreases, states the balance due upon the contract and makes a written record, remaining on file in the office, which can be used upon the adjustment of matters with any county, town, city or village in all cases where any of such municipal corporations contribute towards the cost of the work.

There is no direct provision of the statute which requires the execution of any final contract either upon the part of the Highway Commission or the contractor. Subdivision 9 of section 130 of the

Highway Law, relates to supplemental contracts for contingencies which may arise during the prosecution of the work, and cannot be held to apply to a final contract of the character specified in the letter of inquiry, but subdivision 6 of such last mentioned sections gives the State Commission the power to prescribe the form of the contract and authorizes them to include therein such matters as they may deem advantageous to the State, and pursuant to such authority the Commission, in addition to the plans and specifications which are made and issued relating to each road, has printed and issued with such specification, "Information for bidders," and among such items of information is found the following:

"Upon the completion of the required work as shown in the plans and specifications, should the final estimate of quantities show either increase or a decrease from the approximate estimate of quantities, then such variations will be computed at the unit prices bid and a supplemental agreement will be made respectively adding or deducting this amount from the gross sum bid."

There is also printed with such "Information for bidders," the following paragraph:

"Payment of all estimates, including the final, will be made only for actual quantities of work performed and materials in place as determined by the measurements of the engineer, and this determination as to the quantities involved in any contract shall be accepted *as final, conclusive and binding upon the contractor.*"

Both of these two provisions were printed and annexed to every copy of the specifications, and gave the contractor full notice, not only that he could be called upon to enter into a supplemental contract on the final completion of the work if the final estimates should show either increase or decrease from the approximate estimates, but that the measurements and determinations of the Division Engineer as to quantities should be accepted as final and conclusive by him, and without entering upon a discussion as to whether an action for specific performance would lie against him upon his refusal to enter into a final agreement, it appears that

he has taken the contract with notice that the measurements and determination of the engineer would be binding upon him, and he is concluded thereby.

There being no statute requiring the execution of such a final contract, it simply being a rule or practice of the Highway Department and the contractor refusing to enter into such an agreement, the department would certainly have the right to waive its own rule which the contractor refuses to comply with and to pay the final amount to the assignee or lienors according to their respective rights, provided there is no contest between such assignee and lienors, but great care should be exercised by the department in the payment of any amount or amounts to the assignee or lienors, as I do not think it is authorized to determine or adjudicate upon conflicting claims between such parties if there exists a difference between them.

I do, therefore, advise you that you can safely pay over the balance of the money payable upon this contract to the assignee, unless conflicting claims are made to it, notwithstanding the fact that the contractor refuses to enter into or sign a special agreement covering the changes made in the contract, but a full record should be kept, comprising all changes made, showing acceptance of the work, balance due, and the fact that the contractor refused to enter into a final agreement in regard to such changes, estimates, measurements, etc.

Dated, February 8, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. EDWIN DUFFEY, *Commissioner of Highways, Albany, N. Y.*

MILITARY LAW, § 243 — STATE FINANCE LAW, § 37, AMENDMENT OF 1915.
DISPOSITION OF FUNDS COLLECTED BY THE MILITARY DEPARTMENT.

All funds obtained through the proceeds of sales, from fines and penalties and arising from unexpended balances and accrued interest on the military fund should be paid over to the State Treasurer.

INQUIRY

From the Adjutant-General: An opinion is desired as to whether under the provisions of chapter 216, Laws of 1915, funds

derived from following sources: (a) proceeds of sale of military and naval property found to be unsuitable for use; (b) fines, and penalties collected from delinquent commissioned officers; (c) unexpended balances to the credit of disbanded organizations; and (d) accrued interest on the military fund, should be deposited in the State treasury, notwithstanding the fact that the Military Law (sections 16, 142, 225 and 226), contemplates other disposition.

OPINION

A question similar to that presented here was passed upon by my predecessor, Attorney-General O'Malley, in an opinion printed in the report for 1910, at page 599. There he came to the conclusion that the simple amendment to section 37 of the State Finance Law did not result in its becoming applicable to the military department, especially where the particular provisions of the Military Law referred to in the above inquiry were enacted some time after the original passage of section 37 of the State Finance Law. However, the legislative intent must in all cases be our fundamental guide in determining the scope of statutes, and although I do not disagree with the conclusion reached by Mr. O'Malley in the particular case before him, still, I am forced to conclude at this time that the Legislature by its amendment to section 37 of the State Finance Law last year expressed an intention having a far more sweeping effect than by its amendment of the same statute upon which my predecessor passed. Section 37 of the State Finance Law now provides (the underscored words constituting the amendment of 1915):

“ Section 37. Payments to state treasurer. *After this section as amended takes effect* every state officer, employee, board, department or commission receiving money for or on behalf of the state from fees, penalties, costs, fines, sales of property or otherwise, shall on the fifth day of each month pay to the state treasurer all such money received during the preceding month and on the same day file a detailed, verified statement of such receipts with the comptroller, who shall keep an account thereof in his office. This section shall not apply to the manufacturing fund of the state prisons known as the

capital fund, nor to the receipts of the manufacturing departments of the state hospitals for the insane, nor to the convict deposit and miscellaneous earning fund of the state prisons. This section, *as amended*, shall be deemed to supersede any other provisions of this chapter or of any other general or special law inconsistent therewith."

In the case previously considered by Mr. O'Malley, the Attorney-General based his conclusion on the following considerations: (a) that the amendment of the State Finance Law following the amendment of the Military Law simply dropped out certain exceptions applicable to the health officer of the port of New York and that the mere omission of these exceptions would not make the general provisions of the statute applicable to the military department, especially where the Military Law by its amendments specifically excepted the military department from the restrictions of the State Finance Law; (b) that section 243 of the Military Law at that time provided that any amendments to that statute would be inoperative unless it "explicitly refers to" the Military Law; (c) that the military department was unique in that it was not a civil department of the State government.

However valid the reasons there set forth may have been at that time, I believe they have no application to the present case. A mere reading of the statute would clearly indicate that not only were exceptions previously existing dropped out, but that the prohibitory phrases were redrawn so as to be all inclusive. At the time the amendment of 1915 was proposed it was said upon the floor of the assembly that one of the purposes of the bill was to obtain knowledge as to the extent of different funds in the departments of the State government which were being received and disbursed by administrative officers without any exact knowledge on the part of the fiscal officers of the State. For that reason it was made all inclusive, incorporating only a few exceptions named in the act, to the end that the desired information might be obtained. The provision of section 243 of the Military Law still exists forbidding amendment except by specific reference to the act, and remains in the statute. It did have its value in connection with the particular case considered by Mr. O'Malley. But in the amend-

ment now considered the legislative intent is so plain that we must apply the presumption against irrepealable laws which has been phrased as "acts of parliament derogatory from the power of subsequent parliaments bind not" (see Statutes, Dec. Digest, sec. 149; Century Dig., sec. 218).

The assertion that the military department is not a civil department of the State is also worthy of consideration, but in view of the history of the legislation I must conclude that the reason previously given was argumentative only, and does not go to the real merits of the present situation.

Dated, February 8th, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. LEWIS E. STOTESBURY, *Adjutant-General, Albany, N. Y.*

MEMORANDUM OPINION OF ATTORNEY-GENERAL ON APPLICATION OF THE CITY OF NEW YORK FOR LEAVE TO TEST THE CONSTITUTIONALITY OF CHAPTER 298, LAWS OF 1912, RELATING TO HIGHWAY IMPROVEMENTS.

The City of New York, through its Mayor, Comptroller and Corporation Counsel, has made application to the Attorney-General for permission to commence an action to test the constitutionality of the Referendum Act (chapter 298, Laws of 1912), relating to highway improvements, and to compel, what these officials are pleased to term, an equitable apportionment of moneys raised by bond issues for the improvement of highways under that act among the counties of the State, *including the counties composing the city of Greater New York.* In other words, to compel such an apportionment as would give to the counties within the boundaries of the City of New York a portion of these highway moneys.

The application was made informally at a conference had by these officials with the Attorney-General in the City of New York on January 27, 1916.

The contention of the city is based upon the provisions of section 12, article VII of the Constitution, added in the year 1905, and which became effective January 1, 1906, and particularly

upon the language of that section underscored in the following quotation, which reads as follows:

"**IMPROVEMENT OF HIGHWAYS.** Section 12. A debt or debts of the State may be authorized by law for the improvement of highways. Such highways shall be determined under general laws, *which shall also provide for the equitable apportionment thereof among the counties.* The aggregate of the debts authorized by this section shall not at any one time exceed the sum of \$50,000,000. * * * None of the provisions of the fourth section of this article shall apply to debts for the improvement of highways hereby authorized."

Pursuant to various acts of the Legislature the aggregate amount of \$50,000,000 of bonds authorized by this provision of the Constitution have been issued and sold and substantially the entire amount expended in the improvement of highways, but no part thereof has been apportioned to or expended in the improvement of highways within the counties comprising the city of New York. While the officials of the city complain of this apportionment and use of this first \$50,000,000, the application made to the Attorney-General relates to the maintenance of an action to secure an apportionment of the second \$50,000,000 in such manner as to give to those counties in the city of New York what the city officials regard as an equitable proportion thereof.

We may therefore dismiss from present consideration the apportionment and expenditure of the first \$50,000,000 and pass to the question of the second \$50,000,000 and its application to highway improvement. This second \$50,000,000 of bond issue for highway improvement was authorized by chapter 298 of the Laws of 1912, after approval by a vote of the people, upon submission of the question for their approval or disapproval, under and pursuant to section 4, article VII of the Constitution. This second bond issue was not and could not be authorized or permitted under the provisions of section 12 of article VII, because practically the full amount authorized by that section had, at the time of the passage of the referendum act, either been issued or obligated, and further borrowing thereunder was not permissible.

Under these circumstances the question was submitted to the then Attorney-General for an opinion as to whether or not a State debt can be created for the construction of highways under section 4 of article VII of the Constitution. In a carefully considered opinion Attorney-General Carmody held that such a debt could be created under that provision (upon referendum vote of the people), notwithstanding the addition of section 12 to article VII in 1905. In this connection he said:

“The amendment cannot, in my opinion, be deemed a limitation of the power of the people and the Legislature to appropriate moneys for this purpose additional to those provided for by the twelfth section, in case they should so desire, and should proceed under the conditions prescribed by the fourth section. The effect of adding section 12 was merely to permit the creation of State debts for such purposes to the amount of fifty millions of dollars without referring the same to the people for their approval. It cannot in any sense be deemed a limitation upon the power of the people to vote additional obligations should they so desire under the conditions and limitations prescribed by article VII, section 4.

“The enactment of section 12 does not prohibit the submission of such a question to the people, or interfere with their effective approval thereof subject to the various conditions set forth in section 4 of that article.”

(Report of Attorney-General, 1912, vol. II, pp. 78-80.)

In this opinion I fully concur. The provisions of section 12 cannot be held to be restrictive or limit the power of the Legislature, with the approval of the people, to raise moneys for such purpose under the provisions of section 4 of article VII of the Constitution. Of course, the provisions of the latter section must be complied with in order to effectuate the purpose, and an examination of what was done convinces me that there was such compliance in respect of the second fifty millions of dollars of authorized bond issue.

It is contended, however, notwithstanding the fact that this second bond issue was authorized by virtue and under the provisions of section 4 after an affirmative referendum vote of the

people, that the provisions of section 12 restrict and control the disposition of the moneys raised by such bond issue and require that the highways to be improved thereunder shall be upon a basis of "equitable apportionment thereof among the counties," as required by that section, *including the counties comprised within the City of New York.* This contention is made notwithstanding the express limitations contained in section 4 of the Referendum Act, which restricts the apportionment of these moneys among counties *containing towns.* The counties within the City of New York *contain no towns*, and hence by the express language of the Referendum Act are excluded from participating in the apportionment of these moneys.

The concrete question then is: Do the provisions of section 12 of article VII of the Constitution control in respect of the apportionment of the moneys raised under this second bond issue, so as to require a portion of these moneys to be apportioned to highway improvements in the five counties comprised in the City of New York, as against the provisions of the Referendum Act, authorizing such issue, and adopted pursuant to section 4 of said article, which expressly excludes these five counties in that city from participating in such apportionment?

We can best arrive at a proper solution of this question by approaching and considering it from two viewpoints:

First, the validity and effect of the Referendum Act authorizing this bond issue, and second, whether the Referendum Act is violative of or in conflict with the provisions of section 12 of the same article.

Considering the question from the first viewpoint, it may be stated, without elaboration, that the provisions and conditions of section 4 of article VII of the Constitution in the passage and submission of this Referendum Act (chapter 298, Laws of 1912), were complied with, and that it became effective (unless held to be unconstitutional as being violative of section 12, article VII of the Constitution), upon its approval by an affirmative vote of the people in 1912.

Section 3 of the act provides:

“ § 3. MONEYS DIVIDED BETWEEN STATE AND COUNTY HIGHWAYS. The sum of twenty million dollars of the moneys hereby authorized to be raised shall be used solely for the construction and improvement of State highways as defined by section three of the Highway Law, and the sum of thirty million dollars of the aforesaid moneys shall be used solely for the construction and improvement of county highways as defined by section three of the Highway Law.”

And section 4 provides in part:

“ § 4. APPORTIONMENT OF MONEYS. The State Commission of Highways is hereby directed, immediately after this law shall take effect, to equitably apportion among the counties *containing towns* the total amount of money hereby authorized, etc.”

Then follow specific provisions for the manner of apportionment.

In this connection, and as bearing upon the case in general, it is proper to note that when this act, containing this specific provision which eliminates the counties in New York City from participation in the apportionment of moneys, passed the Senate on March 26th, 1912, it received the affirmative vote of forty senators, and only one vote was cast in the negative, and that one by a senator outside of New York City. And when it passed the Assembly, on March 28th, 1912, it was approved by eighty-two affirmative votes against twenty-nine votes cast in the negative, thirty-three of the affirmative votes and fifteen of the negative votes being cast by members from the City of New York.

The vote of the people gave an affirmative majority of 358,283 in favor of the act, and 76,234 of this majority was given by the electors in the counties within the City of New York, each county giving an affirmative majority.

We have in this State three recognized sources and classes of law: (1) the Constitution; (2) referendum laws, authorizing the creation of debts, enacted by the Legislature and approved by the people pursuant to section 4 of article VII of the Constitution,

and regulating the use and expenditure of moneys for which the debt was created, and (3) legislative enactments.

The Constitution ranks highest in our system of laws, and unless violative of some provision of the Federal Constitution, is supreme and unimpeachable.

Both referendum laws enacted pursuant to section 4 of article VII of the Constitution and legislative enactments, are subservient to the Constitution and neither can be permitted to contravene or violate its provisions. Referendum laws enacted pursuant to this provision of the Constitution rank next in importance to the Constitution and cannot be changed or modified *in respect of basic requirements* by legislative enactments, save in the limited particulars allowed by the provisions of that section, without a re-submission to the referendum vote of the people the same as the original law. Legislative enactments when not in violation of any constitutional provision, or of vested rights, may be repealed or amended at the will of the Legislature, with the approval of the Governor.

We have already alluded generally to the fact that the provisions and conditions of section 4, article VII, in the passage and submission of the Referendum Act, were complied with. One of these provisions, which is a basic requirement of every referendum act presented for adoption under this section, is that the act which provides for the creation of the debt must authorize its creation and that "it must be for some single work or object, *to be distinctly specified therein.*"

The Referendum Act in question did authorize the creation of the debt — this second fifty millions of dollars — and *did distinctly specify in the act* that it was for a single work or object, viz.: "the constructing and improving of the State and county highways as defined in the Highway Law," and then proceeded to distinctly specify the highways to be improved and provided that this money — this fifty millions of dollars — should be apportioned by the Highway Commission for the construction and improvement of highways "among the counties *containing towns.*" Thus we find the Legislature and the people approving this Referendum Act providing for the creation of a debt for highway improvements, but limiting the expenditures of the moneys to the improvement of highways in those counties of the State which

contain towns within their boundaries and by such limitation excluding the expenditure thereof in the counties within the City of New York, because they contain no towns within their limits.

This limitation is one of the basic provisions and requirements of the Referendum Act, approved and adopted by the Legislature and the people, and, being such, the Legislature is without power to eliminate or disregard it or to direct or permit the expenditure of the moneys in any other manner or for other purposes; in other words, the Legislature is without power or authority to authorize the apportionment or expenditure of any of these moneys for the improvement of highways in any of the New York City counties because of the limitation excluding them.

Furthermore, we are clearly of the opinion that the Court does not possess the power which the City of New York seeks to have exercised, through an action by the Attorney-General, to compel the apportionment of these moneys in such manner as to enable the counties in that city to receive any part thereof or to compel the expenditure of any part of the same in the improvement of streets therein. The Court has no power to eliminate or set at naught these words of limitation, with the resulting effect of changing the basis of apportionment from that contained in the Referendum Act. Neither the Court, the Legislature, nor any other authority save the people themselves, can so change this act as to require or permit the apportionment, use or expenditure of these moneys for any other purpose, in any other place, or in any different manner than that specifically stated in the Referendum Act.

The money cannot be diverted to other purposes because section 4 requires the debt to be contracted for "some single work or object to be distinctly specified therein," and further provides that "the money arising from any loan or stock creating such debt or liability shall be applied to the work or object specified in the act authorizing such debt or liability, or for the payment of such debt or liability, and for the payment of such debt or liability, and for no other purpose whatever."

Furthermore, we have no right to assume that the people would have voted it for any other purpose than they did. The will of the people as expressed in the Referendum Act and by their affirm-

ative vote thereon, must control in the expenditure of this money, or the whole act in respect thereof must fall as unconstitutional.

This doctrine essentially goes to the very root and principle of the referendum system. We must spend the money as directed by the people in the Referendum Act, or not spend it at all if it is found violative of some constitutional provision.

This brings it to the consideration of the question presented from the viewpoint of whether the Referendum Act is unconstitutional as violative of or in conflict with the provisions of section 12 of article VII of that instrument.

The contention of the city, through its Corporation Counsel, is that section 12 embodies an exclusive method of creating debts for highway improvements, and excludes the right or power to raise money by bond issue for such purpose by Referendum Act, under the provisions of section 4 of that article.

It is correctly pointed out that the provisions of section 4 are general in terms and relate to the creation of debts generally, and without specific or particular reference to the improvement of highways, but that, prior to the addition of section 12 of that Article in 1905, debts for highway improvements were embraced within these general terms and could have been created thereunder.

However, it is contended that when the provisions of section 12 were adopted and incorporated in the Constitution in 1905, becoming effective on January 1, 1906, *relating particularly and solely to the creation of debts for the improvement of highways*, these provisions established *a complete method and system* by which debts for this specific purpose could be created, and perforce thereof, even thereafter excluded the right of creating any debt to raise money for such purpose by referendum under the provisions of section 4.

The correctness of this contention, as a legal conclusion, must be tested by certain well settled rules of construction.

It may be stated, as a rule of law, in the construction of statutes (applicable as well to constitutional provisions) that where there exists a general statute covering a subject in general terms, which includes a particular case, and a subsequent enactment makes a special rule for that particular case, the latter enactment will be

deemed to have been intended, *within the scope of its provisions, as a substitute for and a repeal pro tanto of such general act.*

Another well recognized rule of construction applicable in this case was laid down by Chief Judge Ruger in *People vs. Angle*, 109 N. Y., at p. 575, as follows:

“We, however, yield our fullest sanction to the doctrine that an amendment constitution ‘must be read as a whole and as if every part had been adopted at the same time and as one law, and effect must be given to every part of it, each clause explained and qualified by every other part.’” (*Gilbert El. R. R. Co. vs. Anderson*, 3 Abbott N. C. 652.)

Still another rule of construction applicable in this case is laid down by Judge Vann in the case of *People ex rel. W. E. & C. Co. vs. Metz*, 193 N. Y. 158, in the following language:

“Every provision of the Constitution as it was before it was amended which so conflicts with the amendment that it cannot be fairly harmonized therewith, necessarily yields thereto, *but only to the extent necessary to make the amendment reasonably effective.*”

These rules and principles of construction apply to the provisions of section 4 and 12 of article VII and to the Referendum Act and constitute the acid test for determining the constitutionality of this act and the legality of the bonds authorized thereby.

Section 12 is the *subsequent and special enactment* and the *debt or debts*, authorized thereby for a special purpose is the *subject matter* thereof to which the *special rule* applies, within the meaning of this rule of construction. This *special enactment* — the provisions of section 12 — *does not assume or purport to cover the whole subject matter* of the creation of debts for the improvement of highways, but, on the contrary, contains an express denial and limitation of authority in that respect by providing that “the aggregate of *debts authorized by this section shall not at any one time exceed the sum of fifty millions of dollars.*” Section 4 of article VII is the *existing general provision of the Constitution which covers the whole subject matter of the creation of debt* (with certain exceptions enumerated therein) *including debts for*

the improvement of highways, within the meaning of this rule of construction applicable in this case.

Section 12 is in conflict with section 4, *if at all*, only to the extent of the fifty millions of dollars of debts authorized thereby, which, under its provisions, was authorized to be created by the Legislature without resorting to a referendum vote as required by section 4. The effect of section 12 was simply to take this fifty millions of dollars of authorized bonded indebtedness from under the referendum requirements of section 4 and confer upon the Legislature the discretionary power to create debts to that amount, to raise money for the improvement of highways, without submitting the question to the people for their approval as required by that section.

That this was the purpose and is the effect and proper construction to be given to the provisions of section 12 is further clearly evidenced by the concluding sentence of that section, which reads as follows: "None of the provisions of the fourth section of this article shall apply to debts for the improvement of highways *hereby authorized*." This reference to "debts * * * hereby authorized" is the fifty millions of dollars referred to in that section, and the language simply says that as to this particular fifty millions of dollars the provisions of section 4 shall not apply.

If the intention was to limit the creation of highway debts to the method and amount prescribed in section 12, the words "hereby authorized" would have been omitted.

To my mind the language of section 12 fails to carry the slightest inference that it was intended to interfere with the creation of debts for highway improvement pursuant to the referendum requirements of section 4, but on the contrary clearly negatives such inference.

It simply releases fifty millions of dollars from the provisions of section 4, as respects the referendum requirement, and in no other particular limits the operations of the provisions of that section, with respect to any other or further debt for highway purposes. Section 12 performs its office and exhausts its force with the handling of the fifty millions of dollars of indebtedness thereby authorized, and section 4 remains and continues in force and effect as respects other debts created for highway purposes.

This construction of the provisions of section 12 as to the extent of its operating to affect or supersede the provisions of section 4 harmonizes with the rule requiring that an amended constitution must be read as a whole and as if every part thereof had been adopted at the same time and as one law, and effect given every part of it, each clause explained and qualified by every other part, and with the further rule that existing and general provisions yield to subsequent or special enactment only to the extent necessary to make the amendment or special enactment reasonably effective.

The suggestion that in adopting section 12 as an amendment to the Constitution the people supposed they were limiting the power to create debts for highway improvement to an aggregate of fifty millions of dollars, except by further amendment to that instrument, and that otherwise they would not have approved the amendment, is not convincing as an argument in support of this construction of section 12, sought to be placed thereon by the City of New York, first, because we cannot indulge the presumption that the people intended to tie their own hands, or limit their own power to vote moneys for this purpose, and, second, because their act in approving the second bond issue by an affirmative vote of over 356,000 majority negatives any such presumption.

Nor are we impressed with the argument that such a construction should be placed upon the language of section 12 as would limit the aggregate indebtedness which might be created for highway improvements to fifty millions of dollars at any one time, by reason of the alleged inequality in the apportionment of the proceeds of the second bond issue under the Referendum Act, occasioned by the limitation contained therein which excludes the five counties in the City of New York from participation in the apportionment.

Prior to the Constitutional Convention of 1894 a strong and insistent agitation had arisen among the people of the State interested in the canals for the enlargement and improvement thereof. This sentiment had become so far crystallized at the time of the Convention that it resulted in the adoption by that body of what is now section 10, article VII of the Constitution, which was approved by the people at the general election of 1894, becoming

effective January 1, 1895. The provisions of section 10 amounted to but little more than a commitment of the people to the approval of the policy of canal improvement, leaving the questions of the character of the improvements and the manner of paying the cost and expense thereof to the Legislature. Following the adoption of this section a careful study of the problems of the improvements and the plans therefor was made. These plans had so far progressed and crystallized as to the character of the improvements to be undertaken that in the winter of 1903 the Referendum Act providing for the building of the Barge canal and the raising of \$101,000,000 by bond issue to defray the cost and expense thereof passed the Legislature and was submitted to the people at the November election in that year for their approval. The people approved the project and authorized the bond issue as provided by the act of the Legislature. Since that time \$53,800,000 of additional money has been raised or authorized to complete the work of canal improvements, pay the damages incident thereto and provide proper terminal facilities, so that in the end at least \$154,800,000 will have been spent in the undertaking for canal improvements.

It is and always has been claimed by the people in the rural communities of the State, not immediately adjacent to the canals, that they would receive no direct and only a negligible indirect benefit from this vast expenditure upon the canals, and generally speaking they opposed the project. They argued, with measureable justice, that the City of New York was to receive the greatest benefit, and that the large interior cities like Buffalo, Rochester, Syracuse, Utica, Albany and Troy were to receive the next greatest benefit from such improvements. And yet, notwithstanding that fact, the rural communities were be taxed to pay therefor in the same ratable proportion as the communities receiving such benefits.

Almost simultaneously with the agitation for the enlargement and improvement of canals, and as a natural sequence thereof, came the agitation for the betterment and improvement of highways. We are informed by the Highway Department that the credit for this movement is primarily due to the League of American Wheelmen following the advent of the bicycle, and later

given great impetus by the coming of the automobile and the organized and well directed demands of the owners of these vehicles, plus the active interest and support of an awakened citizenship to the importance and advantage of such improvements.

As a natural sequence of the good roads agitation came the suggestion, later ripening into a demand as the plans for the canal improvement developed, for State aid in their improvement. In 1893 the Legislature passed two important acts which became laws of the State, with the approval of the Governor, providing for State aid in the improvement and maintenance of highways in rural districts.

These acts were important in that they committed the State to the policy of State aid in the improvement of highways in rural districts, which policy has ever since continued and was a recognized legislative policy at the time of the addition of section 12 to the Constitution in 1905 and at the time of the passage of the Referendum Act of 1912.

One of these acts was known as the Fuller-Plank Act and provided that every town which raised its highway tax in cash instead of working out its tax should receive from the State a sum of money equal to the amount thus raised in cash. The other was known as the Higbie-Armstrong Act, and related to county highways. This act provided that the board of supervisors in any county of the State might petition for the improvement of any highway within the county which was not included within the boundaries of any city or incorporated village. Plans and specifications for these highways were to be prepared by the State Engineer, who also was to have charge of the construction work. The State was to pay 50 per cent., the county 35 and the town 15 per cent. of the cost. An appropriation of fifty thousand dollars was carried by the act as the State's share of such improvement for that year. These acts are still in force although in a somewhat amended and modified form.

Briefly stated these were the existing conditions and the correlations of these two great undertakings when the Referendum Act, providing for the improvement of the canals and authorizing the bond issue of \$101,000,000 to pay the cost thereof, was submitted to and approved by the people in 1903. Partially to sat-

isfy the complaint of the people in the rural districts that they were being taxed for canal improvements, an undertaking of very great magnitude, for the benefit of the larger cities of the State, and from which they were to receive but little, if any, benefit; partially to equalize the benefits to be derived from the expenditure of the moneys of the State for public improvements, and partially in response to the urgent demands for the general betterment and improvement of country highways, insisted even more by the residents of our cities, including New York, than by the residents of the rural districts, and the further demand that the State identify itself to a greater extent than theretofore with such undertakings and contribute more liberally thereto. The Legislature immediately after the adoption of the Canal Referendum Act in 1903 set the machinery in motion to amend the Constitution by adding section 12 thereto, so as to authorize the Legislature to raise money by bond issue for the improvement of highways under its directions.

Section 12 is clearly a debt creating provision intended to carry into effect the legislative policy established in 1898 of rendering State aid in the improvement of highways, whereas section 10, as already stated, adopted 10 years before, was declaratory of and a commitment of the State to a policy of canal improvement, having the raising of the moneys therefor to the existing generally recognized methods, including the referendum under section 4. No analogy exists between section 10 and section 12 which warrants the construction that section 4 was *not* intended to apply to the creation of debts for highway improvements in excess of the fifty millions of dollars authorized by section 12, and nothing in the cotemporaneous history of section 12 or of the Referendum Act in question or in the general equities of the situation would warrant such a construction.

For the reasons stated we are clearly of the opinion and our conclusion is that the Referendum Act (chapter 298, Laws of 1912), does not violate the provisions of section 12, article VII of the Constitution; that said act is constitutional and that the bonds issued and to be issued thereunder are and will be valid and legal obligations of the State.

I do not express an opinion as to what should constitute an "equitable apportionment" of the moneys raised, apportioned or expended under section 12. First, because the question has become academic as to such moneys expended and second, because my predecessor in office denied an application, similar to this, for leave to commence an action to test the constitutionality of certain laws of 1911 apportioning the proceeds of bonds authorized by this provision of the Constitution for highway improvement, and to restrain action by State officials thereunder.

I have given careful consideration to the question as to whether or not permission should be granted to commence an action in the name of the people to test the constitutionality of this Referendum Act, and have reached the conclusion that such permission should not be granted in this case. For the reasons stated I am convinced that such an action could not be successfully maintained because of my firm opinion that the act in question is valid under the provisions of the Constitution. A substantial part of the bonds authorized under this act have been issued and sold and the moneys applied to the improvement of highways as contemplated thereby. An action attacking the constitutionality of this act would at once raise the question of the validity of these bonds and affect their market value, and would at once impair the credit of the State, at least until the termination of the action. With the action pending the further sale of bonds to pay for contract work already let would be impaired, if not rendered impossible. The action would hold up and prevent the letting of new contracts about to be advertised; in fact the commencement of such an action would throw the whole Department of Highways, and the highway work now in progress and contemplated, into confusion and disorder. It seems to me that great harm might and would be likely to arise therefrom.

Therefore, under the broad discretionary powers vested in the Attorney-General in such matters, I feel it my duty to deny the application and withhold permission to commence such action.

Dated, February 11, 1916.

E. E. WOODBURY,
Attorney-General.

EIGHT HOUR LABOR LAW, SECTIONS 3-4; PENAL LAW, SECTION 1271.

A railroad corporation contracting to do the work connected with the building of bridges upon a spur track or switch upon State property to connect a State institution with its main line or lines cannot be relieved from compliance with the eight-hour provision of the Labor Law.

INQUIRY

Can the State make a contract with the Erie Railroad Company to build or repair the bridges upon a spur track upon property owned by the State at Letchworth Village, which spur or switch connects such institution with the main lines of such railroad, and not require such railroad company to comply with the Eight Hour Labor Law?

OPINION

It appears by letter from Hon. L. F. Pilcher, State Architect, that by chapter 727, Laws of 1915, an appropriation was made for Letchworth Village as follows:

“For replacing two temporary wooden bridges on the spur track with permanent structures, \$11,000.”

Pursuant to this appropriation the board of managers took the matter up with the Erie Railroad Company, which is the company operating the institution switch at Letchworth Village, and the company prepared plans and specifications for the replacing of the temporary wooden bridges on a cost basis, with an up-set price of \$10,989.

The board of managers thereupon authorized the making of a contract with such railroad company for the construction of such bridge for the above-mentioned sum, without any public bidding, as the company will not operate its trains over a spur track unless it does the work of maintenance and repair.

The contract, which contained the usual obligatory clause concerning the eight-hour day labor, was drawn and forwarded to the company for execution by it.

It is claimed by the officers of the railroad company that they made the estimate for the work upon a basis of ten hours' work per day, which is the customary time their men work.

The right of way for the spur and the bridges about to be rebuilt is all upon State property. The ties and rails are also owned by

the State. The bridges are necessary to place the spur in a safe condition for the purpose of running cars and engines from the main line of said road to the institution, and is kept in repair throughout the year by the railroad company with their own labor and within their own time, for which the State pays.

The provisions of the Labor Law which apply to the subject under consideration are found in article II of the Labor Law, and section 3 thereof reads in part as follows:

“ § 3. *Hours to constitute a day's work.* Eight hours *shall* constitute a legal day's work for all classes of employees in this state except those engaged in farm and domestic service unless otherwise provided by law. This section does not prevent an agreement for over work at an increased compensation except upon work by or for the state or a municipal corporation, or by contractors or sub-contractors therewith. Each contract to which the state or a municipal corporation or a commission appointed pursuant to law is a party which may involve the employment of laborers, workmen or mechanics *shall* contain a stipulation that no laborer, workman or mechanic in the employ of the contractor, sub-contractor or other person doing or contracting to do the whole or a part of the work contemplated by the contract shall be permitted or required to work more than eight hours in any one calendar day except in cases of extraordinary emergency caused by fire, flood, or danger to life or property. * * *

Each contract for such public work hereafter made shall contain a provision that the same shall be void and of no effect unless the person or corporation making or performing the same shall comply with the provisions of this section; and no such person or corporation shall be entitled to receive any sum nor shall any officer, agent or employee of the state or of a municipal corporation pay the same or authorize its payment from the funds under his charge or control to any such person or corporation for work done upon any contract, which in its form or manner of performance violates the provisions of this section. * * *.”

These provisions are all mandatory and unmistakable, and the fact that the railroad company made its estimate upon a ten-hour-per-day basis does not and cannot relieve either the railroad company or the State officials having the matter in charge from compliance with the statute both in respect to the hours per day that can be worked upon such job and the provisions that must be inserted in the contract for such work.

A railroad company would have the right to enter into an agreement with its employees to work over eight hours per day at increased compensation except upon work by or for the State or a municipal corporation, but it would have no right, even at increased compensation, to require or permit its labors to work more than eight hours per day upon the work in question, for it is State work and paid for by the State, and is located upon State property, and it was not justified in basing its estimate upon a ten-hour-per-day labor, but, whether it did or not, it would be violative of the plain and express provision of the statute to allow the work to be done by ten-hour labor. It would be equally violative of the law to make a contract without inserting a stipulation that no laborer, workman or mechanic doing work upon such bridges should be allowed or permitted to work over eight hours per day.

This provision has been held to be constitutional by our Court of Appeals in *People ex rel. Williams v. Metz*, 193 N. Y. 148.

The failure to insert an eight-hour-per-day provision in the contract, or for the State officers having the matter in charge to allow, or the railroad company to exact or permit such laborers to work more than eight hours per day except in cases of emergency, would vitiate the whole contract, render it unenforceable and subject the company to a forfeiture of any and all sums earned by it upon such work.

Section 4 provides that any State officer having a duty to act in the premises who violates, evades or knowingly permits any evasion of the act shall be guilty of malfeasance in office and be suspended or removed from office, and any citizen may maintain proceedings for such suspension or removal or for the purpose of securing a cancellation or avoidance of the contract.

Section 1271 of the Penal Law makes any person or corporation contracting with the State or a municipal corporation which requires more than eight hours work for a day's labor guilty of a misdemeanor, and upon conviction will be subject to a fine and the contract may be declared forfeited at the option of the municipal corporation.

No State officer has the right, power or authority to waive the provisions of the statute, and any attempts in that direction would not only jeopardize their positions but render them liable for criminal prosecution for malfeasance in office.

My attention has been called to section 19-a of chapter 111 of the Laws of 1914, which applies to the construction of these two bridges and reads as follows:

“ § 19-a. Contracts for connecting institution with line of public service corporation. In all cases in which the contracts to be let are for the purpose of connecting an institution with the system of line or lines maintained or operated by any public service corporation or repairing or improving any such connection, such public service corporation shall not be required to make the preliminary deposit or to give the certified check upon submitting its proposal, nor to give any bond for the performance of the work, nor shall any advertising for proposals be necessary where the public service corporation is to perform the work.”

It will be observed that the above provision is silent as to the number of hours' labor which can be contracted for or permitted as a day's labor, and it therefore follows that no change in the Eight Hour Labor Law was intended by the Legislature. It simply exempts public service corporations from making the preliminary deposit or the giving of a bond upon the submission of a proposal, and the giving of a bond for the performance of the work, and also does away with the necessity of advertising for proposals as required by section 14 of the same act in all cases where the public service corporation is to perform the work, but there is nothing in the act that can be construed as exempting such public service corporation from the provisions of the Eight Hour Labor Law, and if there had been any intention on the

part of the Legislature to exempt such corporation from the Eight Hour Labor Law, in view of the fact that such labor law has been the subject of a recent constitutional amendment and much litigation, there would have been some affirmative, positive provision to that effect. There is no conflict or inconsistency between the provisions of section 19-a and the Labor Law, so there can be no repeal by implication of such Labor Law, and the latter must be held to apply to the construction of the bridges mentioned in the inquiry.

I do, therefore, advise you that a contract should not be made with the Erie Railroad Company, or any other public service corporation, which would relieve it or them from full compliance with the Eight Hour Labor Law.

Dated February 11, 1916.

EGBURT E. WOODBURY,
Attorney-General.

To Hon. L. F. PILCHER, *State Architect. Albany, N. Y.*

BANKING LAW — BONDS CITY OF OMAHA — SAVINGS BANK INVESTMENTS.

Bonds of the city of Omaha, Neb., are legal investments for savings banks in this State.

INQUIRY

An inquiry is submitted as to the right of savings banks in New York to invest their funds in the bonds of the city of Omaha, Neb.

OPINION

The State has created savings banks for the benefit of the people.

The people have shown their appreciation of the savings banks by depositing their moneys therein to an extent probably undreamed of at the time such banks were established.

The State supervises the management and operations of savings banks to a greater extent probably than it does any other class of corporations.

The investment of the guaranty fund and of deposits is carefully provided for by section 239 of the Banking Law, being chapter 369 of the Laws of 1914. Such section reads as follows:

"A savings bank may invest the moneys deposited therein, the sum credited to the guaranty fund thereof and the income derived therefrom in the following property and securities and no others, and subject to the following conditions:
* * *

"Subd. 5. The stocks or bonds of any incorporated city situated in one of the States of the United States."

Such investment, however, is subject to the following conditions:

1st. The city must be located in a State admitted to statehood prior to January 1, 1896.

2d. It must be one which has not repudiated or defaulted since January 1, 1861, in the payment of any part of the principal or interest of any debt authorized by the Legislature of such State.

3d. It must have a population of at least forty-five thousand, and must have been incorporated as a city at least twenty-five years prior to the making of such investment.

4th. It must not have defaulted since January 1, 1878, in the payment of principal or interest of any indebtedness of any kind, or compromised any such indebtedness with the holders thereof.

5th. The indebtedness of the city must not "exceed seven per centum of the valuation of said city for purposes of taxation."

The foregoing are all of the conditions governing the investments by savings banks in city bonds. The bonds of any city which is able to meet the conditions prescribed by section 239 constitute a valid and proper investment of the funds of a savings bank under the provisions of such section.

The State of Nebraska was admitted to statehood prior to January 1, 1896. The city of Omaha has a population in excess of forty-five thousand, and I assume that it has not defaulted in the payment of either principal or interest upon any of its obligations.

If I am correct in this assumption, then the bonds of the city of Omaha are under the terms of the section a proper investment for the funds of savings banks of this State, unless the indebtedness of the city, less its water debt sinking funds, exceeds seven per centum of the valuation of said city for purposes of taxation.

The debt statement of the city of Omaha, issued by the superintendent of accounts and finance, of date May 17, 1915, contains the following statement:

“Actual valuation, \$188,006,220.00.”

Seven per cent of this amount is \$13,160,434, which amount is the debt limit of the city for the purpose of savings bank investment, leaving water bonds out of consideration, unless the assessed valuation of the city is to be taken instead of the actual value of the taxable property.

The indebtedness of the city, according to the “Debt Statement,” is as follows:

General bonds	\$6,646,000 00
New loans offered.....	300,000 00
Water bonds	7,500,000 00
<hr/>	
Total	\$14,446,000 00
Deducting the amount of water bonds.....	7,500,000 00
<hr/>	
We have left.....	\$6,946,000 00
To which must be added special assessment bonds	1,306,000 00
<hr/>	
Making the total indebtedness.....	\$8,252,000 00
Which amount deducted from.....	13,160,434 00
<hr/>	
Leaves a net borrowing capacity of.....	\$4,908,434 00

According to the “Debt Statement,” there is no floating indebtedness.

This amount, \$4,908,434, represents the ultimate limit of borrowing capacity of the city of Omaha on the 17th day of May, 1915, unless under the provisions of section 12 of the Tax Law of the State of Nebraska a method of determining the debt limit of such city is to be adopted different from my understanding of the requirements of the Banking Law of this State.

Of course the limitation upon the right of savings banks to invest their moneys in city bonds was written into the Banking Law for the protection of the depositors of such banks and for that

purpose only. City bonds, under the Banking Law, are legal investments for savings banks only when the total indebtedness of the city, less its water debt and sinking funds, does not "exceed seven per centum of the valuation of said city for purposes of taxation."

This language is perfectly clear. The first step in determining whether the bonds of any particular city are proper for the investment of savings bank funds is to ascertain "the valuation of said city for the purposes of taxation." The next step is to ascertain whether the indebtedness of the city plus the bonds offered for sale "exceed seven per centum" of such valuation.

Section 12 of the Tax Law of the State of Nebraska reads as follows:

"Section 12. *Property taxable — Actual value — Taxable value.* All property in this state not expressly exempt therefrom shall be subject to taxation, and shall be valued at its actual value which shall be entered opposite each item and shall be assessed at twenty per cent. of such actual value. Such assessed value shall be entered in a separate column opposite each item, and shall be taken and considered as the taxable value of such property, and the value at which it shall be listed and upon which the levy shall be made. Actual value as used in this act shall mean its value in the market in the ordinary course of trade."

The proportion established by section 12 is purely arbitrary. It amounts to a statement that one-fifth of the actual value shall be used as the basis upon which the total tax burden shall be distributed. It might with equal propriety have been one-twentieth or one-half.

Indeed, the section might have provided with as much reason and with equal propriety that the "assessed value" be double the "actual value." The result, so far as the amount of the tax upon any particular piece of property is concerned, would have been the same.

The purpose of the provisions of section 239 of the Banking Laws of New York is to provide an ample margin of safety between the "valuation of said city for purposes of taxation" and

the amount of bonds such city may issue of a character suitable and proper as a savings bank investment.

The Nebraska statute is more specific than the statute of New York in one respect. The Nebraska statute declares that the "actual value" of each item shall be obtained, and that the term "actual value" means "its value in the market in the ordinary course of trade."

In order to determine the "assessed value" under the Nebraska statute, the actual value must first be determined. This is the first step to be taken in the distribution and levy of the tax burden. The actual value of each item having been fixed, the next step is to find *twenty per cent* thereof as the basis for the distribution of such tax burden. The percentage "twenty per cent" can only be ascertained after the base is found and established. Then follows the distribution and levy of the tax. Can the tax be levied without first finding the "actual value" of each item? Manifestly not. If not, then the "actual value" is ascertained for the purposes of taxation. Is there any difference in the meaning of the term "actual value" as defined in the Nebraska statute and the term "valuation for purposes of taxation" appearing in section 239 of the Banking Law? I do not think so. As employed in the two statutes they are synonymous. Each expression is calculated to produce the same results as the other. In Omaha the "actual value" of the property will be fourteen and two-sevenths times the amount of the bonds, just as in New York the "valuation for purposes of taxation" must be fourteen and two-sevenths times the amount of the bonds. One is as effective in the way of protection for the investor in the bonds of the city as the other.

If the contention that "actual value" is not the equivalent of the term "valuation for purposes of taxation" is sound, then the bonds of the city of Omaha, to the extent only of seven per centum of one-fifth of the actual value, can be legal investments for savings banks.

I quote again from the "Debt Statement" hereinbefore referred to:

General bonds	\$6,646,000	00
New loans offered.....	300,000	00
Special assessment bonds.....	1,306,000	00
-----	-----	-----
Total	\$8,252,000	00
The <i>assessed valuation</i> for the year 1914, not the <i>actual valuation</i> , as given by the debt statement was	\$37,601,244	00
The borrowing capacity of the city on this basis, so far as New York State savings banks are concerned, is the sum of.....	2,632,087	08
If the assessed valuation is to be taken, rather than the <i>actual valuation</i> , then there are already issued and outstanding bonds to the amount of.....	\$4,043,912	92

which are not legal investments for savings banks, without taking into consideration the special assessment bonds amounting to one million two hundred thousand dollars.

If the borrowing capacity of the city is limited, so far as investment in its bonds by savings banks of this State is concerned, to seven per cent of the *assessed valuation* of the property of the city, then the borrowing capacity is limited to less than one and one-half per centum of the *actual valuation*.

The real question, it seems to me, is what is to be regarded under the New York statute as proper security for the payment of the bonds in the purchase of which savings banks may invest for the benefit of their depositors.

I have read the brief submitted by counsel for the Savings Banks Association of the State of New York with care. It appears therefrom that twenty-three savings banks of this State own bonds of the city of Omaha of the par value of \$1,116,000; that the same question arises as to the bonds of the city of Des Moines under a statute of the State of Iowa similar to the Nebraska statute.

It also appears that savings banks of this State hold bonds of the city of Des Moines of the par value of \$286,000.

If the "*actual valuation*" rule is to control, the bonds are a legal investment for the banks which own them. If not, if the

"assessed valuation" rule is to prevail, then such bonds now owned by such banks are not a legal investment, *and must be disposed of*. They were acquired, doubtless, in the belief that they were legal as savings banks investments, and at a price in excess of their value, if they are not legal investments. They could probably be sold only at a loss. The banks owning such bonds should not be compelled to dispose of them, unless a continuation of such ownership is in violation of section 239 of the Banking Law. I cannot subscribe to that proposition. On the contrary, the term "actual value," as defined in the Nebraska statute, and "valuation for the purposes of taxation," as used in section 239, are, in my opinion, equivalent terms.

This view seems to be in accordance with the weight of the decisions under the Iowa statute.

Halsey & Co. v. Belle Plain, 135 Iowa, 543.

Reed v. City of Cedar Rapids, 136 Iowa, 191.

C. B. Nash Co. v. City of Council Bluffs, 174 Fed. Rep.

My conclusion, therefore, is that the bonds of the city of Omaha held by the savings banks of this State are proper as investments for the funds of such banks, and that such banks may continue to hold them as such investments.

Dated February 29, 1916.

E. E. WOODBURY,
Attorney-General.

To SUPERINTENDENT OF BANKS, Albany, N. Y.

POWERS OF THE COMPTROLLER IN CONNECTION WITH THE EXPENDITURES OF THE PANAMA-PACIFIC COMMISSION — CONSTITUTION, ARTICLE V, SECTION 6, LAWS OF 1912, CHAPTER 541.

The State Comptroller has no power of audit of the expenditures of the Panama-Pacific Commission.

STATEMENT

The Legislature by chapter 541 of the Laws of 1912 determined that the State should participate in the Panama-Pacific Exposition to be held at San Francisco in 1915.

The act provided for the creation of a commission of fifteen members charged with the duty of arranging for the proper participation of the State in such exposition, provided for the erection of a suitable building for the needs of the State, and limited the amount to be expended by such commission to the sum of seven hundred thousand dollars. Two hundred and fifty thousand dollars were appropriated by the Act of 1912 and additional amounts in succeeding years.

INQUIRY

The Comptroller desires to be informed whether he has any power of audit or other control over the expenditures of commission.

OPINION

By the terms of the act it was the duty of the commission to elect from its members a chairman and a vice-chairman.

The Comptroller is specifically directed to pay over to the Commission the moneys appropriated, upon the requisition of the chairman and vice-chairman, accompanied by an estimate of the amount required for the purposes of the commission.

Within ninety days after the close of the exposition the commission is required by the act to file with the Comptroller a verified report of the disbursements made by it and to return to the State treasury "any unexpended balance of money drawn in pursuance of the act."

It is by the terms of the act made the duty of the commission to "encourage and promote a full and complete exhibit of the commercial, educational, industrial, artistic, military and naval and other interests of the State and its citizens." No instructions are to be found in the act as to the methods to be employed to this end. Its sole duty is to promote and encourage the exhibit.

The commission had legislative authority for constructing and furnishing a building for the accommodation and convenience of visitors. It exercised its authority and constructed and furnished such a building. Doubtless such construction tended to "encourage and promote" the complete exhibit contemplated by the act. The fact of the appropriation was undoubtedly made known to

prospective exhibitors. Because of the fact that it was known that a State building was to be or was being erected, individuals were encouraged to enter their exhibits, who, except for such construction, might not have cared to exhibit.

Whatever the fact may be, whether the construction of the building did or did not actually tend to encourage and promote a full and complete exhibit of the State's resources, the commission acted within the scope of its authority. It was vested with a discretion which it exercised.

Has the Comptroller any power to question the commission as to its expenditures? I do not find that he has. It was his duty to draw a warrant upon the Treasurer in favor of the commission for the payment of the moneys appropriated by the act whenever a requisition signed by the chairman and the vicechairman was presented to him accompanied by the estimate required by the act. The act itself gives to the Comptroller no authority whatever. It is a special act complete in itself providing a complete plan for the accomplishment of the purpose to which the State was committed by its passage. No provision of any general law relating to the powers of the Comptroller can be extended to cover the transactions of the commission.

It goes without saying that the Legislature might have limited the powers of the commission in any one or many ways. It might have provided that the Comptroller should have full and complete powers of audit and approval and disapproval of its expenditures, but it did not.

The act did provide for the payment of the actual and necessary expenses of the commission, but it did not provide any method of auditing such "actual and necessary expenses," except that, within ninety days after the close of the exposition, the commission must file with the Comptroller a verified report of its expenditures and return any unexpended balance. Such verified report when filed will, of course, become a public record subject to the inspection of any interested citizen.

However, it is hardly my province to suggest what might have been included in the act. I am asked to define the powers of the Comptroller in relation to the expenditures of the commission and as to the vouchers now on file in his office or hereafter to be filed with him.

I am unable to discern that he has any power. He cannot compel the filing of any vouchers. He cannot reject any vouchers offered for filing in his office on the ground that they are improper in form or that they disclose an improper expenditure of the State's funds. He has no discretion. He has no power to review the exercise by the commission of its discretion. His duty will be fully performed whenever he shall have received and filed in his office the verified statement of the expenditures of the commission and when the commission shall have returned to the treasury any unexpended balance drawn in pursuance of the terms of the act under which the commission was created.

For this situation the Comptroller is not responsible. He has no inherent power of audit. He possesses no power except such as is given to him by statute.

The cases of *People ex rel. Grannis v. Roberts* (163 N. Y. 70) and *Quayle v. The State* (192 N. Y. 47) clearly enunciate that the Legislature may place the power of audit where it will, in the Comptroller or elsewhere. The Comptroller has no time-honored common-law function of audit, for his office was created by statute in 1797 and first became a constitutional one in the Constitution of 1821. What powers and duties the Comptroller shall exercise are left by the Constitution to the Legislature. His powers and duties, the Constitution recites, "shall be such as now are or hereafter may be *prescribed by law.*" (Constitution, article V, § 6.) It is, therefore, within the province of the Legislature to confer or withhold the power of audit, and the Legislature is the sole judge in a given case whether the Comptroller shall audit or that power shall be exercised by others. As the court said in the *Grannis* case in proceeding to ascertain where the power of auditing canal claims lay:

"The legislation of the state, from the first session down to the present time, has provided for the auditing of the accounts *by some state officer.* At the first legislative session it was provided that accounts against the state should be audited by the auditor-general. (Laws of 1778, chapter 35.) In 1782 an act was passed providing for the appointment of an auditor, whose duty is should be 'to audit, liquidate and settle all accounts now subsisting, or which may hereafter

arise * * * between this state and any other person or persons whatsoever.' (Laws of 1782, chapter 21.) In the year 1797 an act was passed providing for the appointment of a comptroller, who 'shall do, perform and execute all matters and things whatsoever required by law to be done by the auditor-general of this state, * * * and to examine and liquidate claims against this state in all cases in which provision is or shall be made by law.' (Laws of 1797, chapter 21.) The duties of the comptroller, as expressed in the State Finance Law (Laws of 1897, chapter 413) are (1) to superintend fiscal concerns of the state; (2) keep audit and state all the accounts in which the state is interested; (3) keep correct and proper books, showing their condition at all times, and (4) examine, audit and liquidate the claims of all persons against the state if payment thereof out of the treasury is provided for by law.

As at certain periods of time the power to audit canal claims has been conferred upon other officers, an investigation of the legislation in that direction becomes necessary *in order to ascertain whether that power is at present in the comptroller.*"

And referring to the statute of 1883, chapter 69, which conferred power upon the Comptroller to audit canal claims, but which was repealed in 1896, one year previous to the enactment of the State Finance Law, which again conferred power upon the Comptroller to audit canal claims, the court said:

"It was regarded (as a reason for repealing the statute of 1883) that the substance of it had been merged in the State Finance Law. Such, I think, would have been the effect had the State Finance Law been adopted in the year 1896, but it failed of passage while the repealing act was enacted. A year later, however, the State Finance Law was passed. (Laws of 1897, chapter 413.) For the period of about one year intervening the enactment of the repealing act of 1896 and the passage of the State Finance Law of 1897, *the comptroller was without power to audit claims and accounts presented against the canal fund*, but the passage of

the latter act *reinvested him with the power*, which it was never intended to take away, to audit all claims against the canal fund as well as against the general fund."

By the terms of chapter 541 of the Laws of 1912 complete power was conferred upon the Panama-Pacific Commission to expend the moneys appropriated without any supervision by the Comptroller, and all the provisions of the State Finance Law were nullified and set aside as to the expenditure of such moneys for the purpose of encouraging and promoting a complete exhibit of the resources of the State at the Panama-Pacific Exposition.

In support of my consideration of the statute under consideration I call attention to the provisions of similar legislative acts enacted by previous legislatures.

In 1892 the Legislature, by chapter 236, provided for the representation of the State at the World's Columbian Exposition. A commission was created and an appropriation made "to be paid by the Treasurer upon the warrant of the Comptroller, issued upon the requisition of the board of general managers, signed by the president and secretary, accompanied by estimates of the expenses for the payment of which the money so drawn is to be applied".

Chapter 721 of the Laws of 1905 provided for the appointment of a "Commission for the Jamestown Tercentennial Exposition." Section 4 of this act provided for the payment of the moneys appropriated upon a requisition, the language being identical with the language quoted above from the Act of 1892.

In chapter 36 of the Laws of 1899 the Legislature provided for the appointment of a board of general managers of the exhibit of the State of New York at the Pan-American Exposition. This act carried an appropriation "to be paid by the State Treasurer upon the warrant of the Comptroller upon verified vouchers approved by the president and secretary of the board of managers *after due audit by the Comptroller*.

By the terms of the above act the Legislature exercised its undoubted right to provide for the method of auditing vouchers and expenditures. It directed that all claims *should be audited by the Comptroller*.

It was within its power to so provide, and it was equally within its power to provide the method found in chapter 541 of the Laws of 1912.

The entire matter was within the jurisdiction of the Legislature. For reasons sufficient to itself it provided for an audit by the Comptroller as to expenditures in connection with the Pan-American Exposition. The presumption is that the Legislature had its reasons for omitting to give the Comptroller the power of audit as to expenditures in connection with the Panama-Pacific Exposition. Whether there were reasons or not, the fact remains that the Legislature has provided the method for the payment of the moneys appropriated for the purposes specified in the act. We have nothing to do with that question.

In my opinion the Comptroller has no right of audit of the bills of the commission and no power whatever in connection with its expenditures.

Dated March 1, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. EUGENE M. TRAVIS, *State Comptroller, Albany, N. Y.*

POWERS OF THE COMPTROLLER WITH REFERENCE TO DISBURSEMENTS OF LEGISLATIVE COMMITTEES.

The Comptroller has no power of audit of the expenditures of the Thompson Public Service Investigating Committee.

OPINION

Section 1 of article V of the Constitution provides for the election of a Comptroller. Section 2 of said article fixes the term of office of the Comptroller. Section 5 of the same article provides that he shall be a commissioner of the land office and of the canal fund and a member of the canal board.

Nowhere in the Constitution is there to be found a declaration of the powers and duties of the Comptroller. Moreover, the Constitution provides in article V, section 6, that the powers and duties of the Comptroller "shall be such as now are or hereafter may be prescribed by law." It is, therefore, necessary to refer to

the statutes of the State whenever a definition of his powers and duties is desired.

Section 4 of article II of chapter 16 of the Consolidated Laws, being chapter 58 of the Laws of 1909, reads as follows:

“Section 4. Duties of comptroller. The comptroller shall:

“Superintend the fiscal concerns of the state.

“2. Keep, audit and state all accounts in which the state is interested.

“3. Examine, audit and settle the accounts of all public officers and other persons indebted to the state and certify the amount or balance due thereon.

“4. Examine, audit and liquidate the claims of all persons against the state, if payment thereof out of the treasury of the state is provided for by law.

“5. Draw warrants on the treasury for the payment of the moneys directed to be paid out of the treasury, but every such warrant shall refer to the law under which it is drawn.”

Subdivision 6 requires the Comptroller to make a report to the Legislature annually. Subdivision 7 authorizes him to vote and represent the State whenever the State is entitled to vote in any stockholders' meeting. Subdivision 8 confers upon the Comptroller the administration of all court funds.

There the numerous statutes which confer upon the Comptroller powers and duties in connection with the administration of the business and affairs of the State, but no general statute enlarging generally or broadening his powers of audit and control of expenditures.

Section 11 of chapter 653 of the Laws of 1886 reads as follows with respect to the expenses of legislative committees:

“Whenever, by resolution of either house, a committee shall be directed to conduct an investigation, or take testimony in any other place than in the city of Albany, the comptroller shall draw his warrant for the payment of the actual and necessary expenses incurred thereby by such committee or sub-committee having in charge such investigation, inquiry or taking testimony, together with the actual and necessary expenses of such officers and employees as shall be

authorized to accompany them; but no such expense shall be paid until a bill of the items thereof, in detail, shall be rendered to the comptroller, and the correctness thereof shall be certified by the chairman of such committee, and duly approved by the president of the senate, in a case of a committee of the senate, and by the speaker of the Assembly in the case of a committee of the assembly, *and duly proved by affidavit or otherwise, to the satisfaction of the Comptroller.*"

The foregoing provisions are no longer in force. They are superseded by section 63 of the Legislative Law (enacted Laws of 1892, chapter 682, section 63), being chapter 32 of the Consolidated Laws, which reads as follows:

" Whenever by resolution of either house, a committee duly appointed by it, shall be directed to conduct an investigation or take testimony in any other place than the city of Albany, the comptroller shall draw his warrant for the payment of the *actual and necessary expenses* of the committee or sub-committee having in charge such investigation, and of the officers and employees authorized to accompany them, *upon the rendition of an itemized bill of such expenses certified by the chairman of the committee, and approved by the presiding officer of the house by which the committee was appointed, and upon proof by affidavit or otherwise that the same is due.*"

Whether the final clause in the statute of 1886 conferred any power of audit upon the Comptroller we need not determine, for certain it is that the final clause of the now existing statute, (section 63 of the Legislative Law) does not confer any such power.

The duty of determining whether the expenses were actual and necessary has been placed, it seems, by the Legislative Law not upon the Comptroller but upon the chairman of the committee and presiding officer of the house which appointed the committee.

All the Comptroller can demand from the person presenting the bill is that the same be itemized and proof that the amounts are due. In other words, the auditing power of determining the actual and necessary expenses is left with the chairman of the

committee and the presiding officer of the house, and the special and only duty of the Comptroller is to demand, in addition to an itemized bill, an affidavit or other proof from the person presenting the bill that the *sums are due*, in order to prevent the payment of State moneys for no value received or for amounts already paid.

The initial appropriation for the Thompson committee, pursuant to a Senate resolution of January 18, 1915, was \$5,000, to be

"paid from the funds appropriated for contingent expenses of the legislature, by the treasurer on the warrant of the comptroller upon the certificate of the chairman of such committee for the expenses of such committee and its investigation."

Each subsequent appropriation for the committee contains the same provision.

The supply bill of 1915 (chapter 726), which appropriated the moneys from which these committee expenses are to be paid, provides in general as follows:

"Section 1. The treasurer shall pay, on the warrant of the comptroller, from the several sums specified, to the persons, and for the purposes indicated in this act, the amounts named or so much thereof as shall be sufficient to accomplish, in full, the purposes designated by the appropriations, which several amounts are hereby appropriated out of any moneys in the treasury not otherwise appropriated. No warrants shall be issued, except in the case of salaries, until the amounts claimed shall have been audited and allowed by the comptroller, who is hereby authorized to determine the same, upon vouchers presented as required by section twelve of the state finance law."

And with respect to the particular appropriation for contingent expenses of the Legislature the supply bill of 1915 also provides:

"For the expenses of legislative committees, including compensation of witnesses; for indexing the bills, journals and documents of the senate and assembly; for indexing the

executive journals of the senate and for the preparation of supplementary indices to senate and assembly bills, journals and documents, *to be paid on the certificate of the temporary president of the senate or the speaker of the assembly, respectively, for postage, express and transportation of letters, reports, documents, etc.*"

The provisions of the supply bill would, of course, supersede the provisions of the Legislative Law, and the special provisions of the supply bill would in turn supersede the general provisions of the supply bill if it appears that both provisions of the supply bill, general and special, cannot or were not intended to operate together.

That the last provision (the special provision) of the supply bill was intended to prevail exclusively seems apparent from the fact that its phraseology is similar to that in section 63 of the Legislative Law, which we have seen does not require an audit by the Comptroller, and from the further fact that many other appropriating items of the supply bill provide in express terms for an audit by the Comptroller which connotes that the Legislature sought to be specific as to different items and desirous of modifying, limiting, dispensing with or reasserting the general provision for audit of the beginning of the bill.

The foregoing conclusion is the more readily arrived at in view of the fact that the practice with respect to the payment of the expenses of legislative committees has been for many years (and therefore was in the mind of the Legislature when it enacted the supply bill of 1915) for the Comptroller to pay, without his audit, upon the certification of the bills by the chairman of the committee and the presiding officer of the respective house.

The Comptroller, in my opinion, cannot exercise a power of audit over the Thompson Legislative Committee expenditures.

Dated March 1, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. EUGENE M. TRAVIS, *State Comptroller, Albany, N. Y.*

GENERAL BUSINESS LAW, ARTICLE 7-A — ARCHITECTS — REGISTRATIONS — GENERAL OPERATION.

Scope of the act requiring the examination and registration of architects discussed.

INQUIRIES

1. May a person who has gained his practical experience outside the State be registered for the purpose of:

- (a) Opening an office and practicing exclusively here;
- (b) For the purpose of practicing only casually here, without opening a regular office?

2. What is the scope of the provision requiring application for registration within certain times after the law takes effect?

3. May a person be registered as an architect who, prior to the enactment of the statute providing for registration, was not exclusively engaged in the practice of architecture?

OPINION

Article 7-a of the General Business Law, providing for the admission of registered architects to practice in this State, was added by chapter 454 of the Laws of 1915 (effective April 28, 1915). Administration is given to a board of examiners under the authority of the Regents of the University of the State of New York.

The legislative purpose expressed will undoubtedly be accomplished by a discreet and liberal administration of the statute's terms. This department had occasion to pass upon a similar situation in construing the law applicable to undertakers and embalmers. There a broad and general construction, leaving full opportunity for administrative discretion was recognized (1913, Attorney-General's Opinions, 347).

The control over admission to practice of the professions and callings has lately been discussed in *People vs. Griswold*, 213 N. Y. 92. Although this exercise of the police power is broad and subject only to general limitation by the courts, still the method of exercising the power is itself as important as the mode of its grant by the Legislature. In the case of *Yick Wo vs. Hop-*

kins, 118 U. S. 356, there is pointed out the unlawful results flowing from the stringent exercise of powers under an ordinance of somewhat general statement.

The nature of the inquiries is such that only by an analysis of the statute step by step may their solution be clearly indicated. At the outset, section 77 requires that a person who was not practicing architecture prior to April 28, 1915, must procure a certificate from the State Board of Examiners in order to be "styled or known as an architect." Persons procuring the certificate are to be known as "Registered Architects," using the letters "R. A." It is therefore apparent that the status of persons who were known as architects prior to the enactment of the statute is not interfered with and they may continue to be known as architects, simply. If they desire the added appellation of "Registered Architect" they may apply for certification as will presently be shown. Persons who have not been in practice may not be styled or known even as architects in the future. In order to enter upon practice at all they must qualify as "Registered Architects."

The methods of admission are laid down in section 79. Generally admission is open only to citizens of the United States and those who have declared their intention of becoming such. It is clear therefore that foreigners who were not previously resident or practicing here will be almost entirely excluded from the regular practice of architecture of this State. The section first provides a method of entrance by examination. Preliminary education is prescribed with an apprenticeship of five years as qualification for examination. Apparently work in professional schools may supplement the apprenticeship or be substituted for it in part. Then follow provisions for exemption from examination, and it is with the application of these that the inquiries principally deal. The Board of Examiners may exempt applicants from examination for admission as "Registered Architects" on the following grounds:

- (a) As graduates of architectural schools and with three years practical experience;
- (b) As admitted to practice in another State or country having reciprocal legal requirements;

(c) Practicing architects who have been engaged in their profession for certain periods of time. A person who has been *actually and exclusively* engaged in practice on his own account for *one* year prior to the enactment of the law (April 28, 1915), may apply under this, or, if practicing as an architect in the employ of other architects, he must have been *continuously and exclusively* in practice *two* years.

The first question has to do with the right of architects whose experience or practice was gained outside the State to apply for examination, or to apply for exemption under classes (a) and (c) (section 79, subdivisions 1 and 3).

In my view, the right of any person to pursue a lawful business in this State is always presumed and recognized. There being no words in the statute necessarily or expressly excluding United States citizens from other States and foreign countries, the board has no power to exclude such persons from participating in the benefits of the exemption. The comity and reciprocal relations recognized with other States and countries as to those who have been admitted in other jurisdictions, fortify my conclusion, rather than assail it; for in such cases the statute gives an absolute right of admission to a licensed architect in a State or country having reciprocal relations. The right given class (b) is a legal status immediately recognized here. Such artificial status of class (b) conveniently is established by the statute. However, the actuality and adequacy of the education or experience of those who have not been admitted to practice elsewhere is something an administrative board should naturally determine. It follows that the simple facts of experience or education gained outside New York are equally subject to ascertainment by the board whether there is registration in the other State or country or not. If such experience does exist the board must accept it as though gained in this State.

The last part of the first question relates to the right of the board to require assurance of the intention of non-residents to practice here permanently. As in the case of undertakers, above referred to, this statute likewise is without indication that the board must demand proof that the applicant intends to open and maintain an office in this State. Such intention is speculation that the board may not require of the applicant, nor may it pass on the reality of the contemplated action. Nor is the board given

power to revoke a certificate simply because the licensee does not in fact make use of it in New York continuously.

It is therefore my opinion that a non-resident may, like a resident, present proof of educational and experience qualifications gained outside this State for admission to examination under the statute; or he may make application for exemption from examination under classes (a) and (c) like any resident. This statement is, however, subject to the following qualifications. The applicant for examination or exemption must be a United States citizen or have declared his intention; also the educational qualifications must be gained in schools recognized by the administrative officers, and it might happen that some schools at which the candidate studied in foreign countries, other States or even in New York, would not be so recognized. Further than this, it is apparent that those persons who were prior to the statute practicing as architects, simply, and who desire to continue as such without qualifying as Registered Architects must, under the provisions of section 77, have resided here or had a place of business here while so practicing.

The second inquiry involves the question as to whether or not the time limitations relating to application for exemption by class (c) apply equally to classes (a) and (b). As above stated practicing architects who desire the added title of "Registered Architect" must apply for exemption after one year or two years' practice, depending on whether they had practiced on their own account or as employees. However, these time limitations contained in section 79, subdivision 3, are not restrictions on classes (a) and (b). (See section 79, subdivisions 1 and 2.) As without limitations their exemptions necessarily must be regarded as continuing. Each class is dealt with in a separate subdivision of the section and, therefore, we may not assume that limitations contained in subdivision 3 applicable to class (c) relate generally to (a) and (b). Further, it is apparent that the reciprocal provisions applicable to other States [class (b)] were meant also to be continuing as the foreign and domestic statutes might be brought into general conformity with ours. This new act could never be sustained upon a theory that it was intended now to forever fix the status of all persons at present practicing or preparing to do so,

to the almost complete exclusion of other persons who may desire to come into the State.

The last question relates to the requirement of "actual," "continuous" and "exclusive" practice by those who were in practice before the law took effect and who do not desire to continue simply as architects, but who wish to become "Registered Architects."

These requirements of actual, continuous and exclusive service must be construed in the light of the actual practice of a profession. We find many times that an architect, or lawyer, or doctor intends to make his work exclusive of all others and actually holds himself out to do so. Situations readily present themselves to the mind where, due to lack of clientele and for other reasons, the practitioner finds time or is forced to deal incidentally and temporarily with avocations. Such a person is not excluded from admission, if the canons of good faith and conduct are satisfied. We have presented cases, therefore, which require delicate administration and in which the board has power to construe and should construe the statute most favorably to the applicant.

Dated, March 14th, 1916.

E. E. WOODBURY,

Attorney-General.

To Hon. FRANK B. GILBERT, *Chief of the Law Division, State Department of Education, Albany, N. Y.*

LIQUOR TAX LAW, SECTION 30, SUBDIVISION C—SELLING LIQUOR ON PRIMARY DAY.

A person holding a liquor tax certificate is not prohibited from selling liquor on a primary day.

INQUIRY

Does the provision of the Liquor Tax Law prohibiting the sale of liquors on any day of a general or special election apply to the days upon which primaries are held?

OPINION

It is provided in section 30, subdivision C, of the Liquor Tax Law, that it shall not be lawful for any person either with or without a Liquor Tax Certificate to sell or give away any liquor:

"On any day of a general or special election, or city election or town meeting, or village election within one-quarter of a mile of any voting place, while the polls of such election or town meeting shall be open."

The only way the above act can be held to apply to a primary is by construing the words "special election" as applicable thereto. It cannot be claimed that a primary is a general election, as they are all held on the Tuesday next succeeding the first Monday in November, and special elections can only be held on some day designated by the Governor to fill a vacancy as provided by sections 292 and 293 of the Election Law, so it is evident without further consideration, that a primary was not intended by the Legislature to be covered by the provisions of section 30, subdivision C of the Liquor Tax Law.

The above provision of the present Liquor Tax Law was passed in 1896, and became chapter 112 of that year, and subdivision C has remained unamended since that time so far as the above quotation is concerned, but the section has been re-numbered. There were no official or unofficial direct primaries held at that time, neither had there been any particular agitation of the subject of direct primaries in this State at that time and there was not until several years thereafter, so it is not possible for the Legislature to have intended at that time to make the provisions of Subdivision C broad enough to cover a primary day. The Election Law was amended by chapter 891 of the Laws of 1911 providing for the nomination of candidates by direct vote of the enrolled voters of the respective parties at what are generally called "direct primaries." Official and unofficial primaries are held for the purpose of placing candidates in the field for election at some general or special election which is to follow and for the purpose of electing persons to party position. I am unable to find that such primaries are anywhere called or referred to as an "election" or a "special election," but are sometimes referred to as "official primary elections," and also as "unofficial primary elections." It would be strange if the Legislature ever intended that subdivision C should apply to such primaries, that it has not passed some amendment to that effect, and it is safe to assume that if any

legislative body, since the enactment of the Primary Law, had intended to make subdivision C apply to such primaries that we would find some plain and unequivocal provision of that character, and that a subject of such general interest would be left to interference or to a forced and strained construction of the statute, is highly improbable. Some five years have elapsed since the establishment of a primary day and up to this time the day has never been regarded as within the inhibition of the statute as to the sale of liquor thereon.

The prohibition against the sale of liquor upon a direct primary day was certainly not within the spirit of the act for no such day was then provided for or even in contemplation, and it is certainly not within the letter of the act.

The sale of liquor is made lawful when the holder of a certificate has complied with all the requirements of the statute and he is at liberty to sell his merchandise at all time and to all persons except as he is directly and specifically prohibited by some law, and to hold that because he is prohibited from selling upon a general or special election day, he is also prohibited from selling upon a primary day, would be doing violence to both the spirit and the letter of the law.

A punitive or prohibitive statute cannot be extended by inference or implication beyond its direct and specific provisions, for the purpose of rendering an act unlawful which would otherwise be lawful.

I am therefore of the opinion that subdivision C of section 30 of the Election Law does not apply to the sale of liquor on primary days.

Dated, April 1, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. GEORGE E. GREEN, *Commissioner of Excise, Albany,*
N. Y.

INVESTMENTS FOR SAVINGS BANKS—BONDS OF THE CITY OF EL PASO,
TEXAS—BANKING LAW, § 239—32 UNITED STATES STATUTES AT LARGE,
825.

Bonds of the City of El Paso, Texas, are legal investments for savings banks of the State of New York.

STATEMENT

Section 239 of the Banking Law provides among other things that a city must possess a population of at least 45,000 before its bonds may be purchased and held by savings banks of the State. "The Federal census next preceding" a contemplated investment in the bonds is referred to by the statute as the source for determining whether a city has the requisite population. It seems that the city of El Paso, Texas, had by the decennial Federal census of 1910 a population of 39,279 and by a special Federal census of the city taken as of January 15, 1916, a population of 61,898. Tested by the census of 1910 the bonds of that city would not be legal investments, but if the special census figures of 1916 may be used the bonds have become legal investments.

INQUIRY

The State Banking Department therefore desires to be informed whether under the language of section 239 of the Banking Law savings banks may now invest their deposits and sums credited to their guaranty funds in bonds of the city of El Paso.

OPINION

Subdivision 5 of section 239 of the Banking Law provides as follows:

"§ 239. INVESTMENT OF DEPOSITS AND GUARANTY FUND AND RESTRICTIONS THEREON. A savings bank may invest the moneys deposited therein, the sums credited to the guaranty fund thereof and the income derived therefrom, in the following property and securities and no other and subject to the following restrictions:

* * * * *

5. The stocks or bonds of any incorporated city situated in one of the States of the United States which was admitted to

statehood prior to January first, eighteen hundred and ninety-six, and which since January first, eighteen hundred and sixty-one, has not repudiated or defaulted in the payment of any part of the principal or interest of any debt authorized by the Legislature of any such State to be contracted, provided said city has a population, as shown by the *Federal census next preceding said investment* of not less than forty-five thousand inhabitants, and was incorporated as a city at least twenty-five years prior to the making of said investment;
* * *."

The section in its remaining sentences continues to enumerate various other limitations and restrictions which must have been observed by the city.

It appears from proof furnished and certified February 18, 1916, by the City Clerk of El Paso that the city has complied in all respects (omitting the question of population) with every provision of the statute. There remains accordingly for determination only the narrow and definite question whether the city has a population of over 45,000 "as shown by the Federal census next preceding said investment."

The word "census" has been oftentimes defined generally as an official reckoning or enumeration of the inhabitants and wealth of a *country or State*. But I find no hesitation in concluding that there can be a census of a city as well. (*State ex rel. Ryan v. Wooten [Mo.]*, 122 S. W. 1101, 1103; *Cothran v. Cook [Cal.]*, 80 Pac. 699; *City of Huntington v. Cast [Ind.]*, 48 N. E. 1125; *State v. Faulkner*, 20 Kans. 541; *O'Bryan v. City of Owensboro [Ky.]*, 68 S. W. 858). Moreover in any general census of the county or State that portion which covers a particular city must in effect produce a census of the city.

As section 239 of the Banking Law, in the part under discussion, is interested only in the actual population of a city taken with due precision, any next preceding Federal census would appear to be of sufficient reliability to meet the necessities of the statute, unless of course it be that the Legislature has purposely singled out for exclusive use what is known as the decennial Federal census taken under the authority of the Federal Constitution.

I have examined several statutes of the State where a census or enumeration is referred to, but have received no aid from them in interpreting this section of the Banking Law. (Constitution, article XII, section 2; Village Law, section 310; Liquor Tax Law, section 8; Matter of Ahlers, 141 A. D. 891; section 81, Executive Law of 1892).

The power of the President to direct the taking of the special census of El Paso is found in the organic act creating the Department of Commerce and Labor, Act of February 14, 1903, wherein it is provided in section 8 as follows:

“That the Secretary of Commerce and Labor shall annually, at the close of each fiscal year, make a report in writing to Congress, giving an account of all moneys received and disbursed by him and his department, and describing the work done by the department in fostering, promoting and developing the foreign and domestic commerce, the mining, manufacturing, shipping, and fishery industries, and the transportation facilities of the United States, and making such recommendations as he shall deem necessary for the effective performance of the duties and purposes of the department. *He shall also from time to time make such special investigations and reports as he may be required to do by the President, or by either House of Congress, or which he himself may deem necessary and urgent.*”

Under the authority conferred by the above act the following special censuses have been taken under direction of the President: Oklahoma and Indian Territory, July 1, 1907; Tulsa, Oklahoma, April 15, 1915; Hamtramck, Michigan, June 25, 1915; Highland Park, Michigan, November 15, 1915; St. Clair Heights, Michigan, November 18, 1915, and Hastings, Nebraska, December 13, 1915.

The phrase “by the Federal census next preceding said investment” first appeared in the Banking Law in 1905 (chapter 401). It will be observed that when this phrase was inserted in the State statute the power of the President to direct a special census existed under the Federal law, and the New York Legislature may properly be deemed to have enacted section 239 of the Banking Law with knowledge of the existence of the special provision.

There is nothing in the wording of the phrase "by the Federal census next preceding said investment" which to my mind would confine its operation to a Federal census taken at the expiration of every tenth year. Neither the Constitution of the United States nor the Federal Census Act of March 3, 1899, require that a Federal census be taken at the expiration of every ten-year period. Rather the language is, that a census shall be taken "within three years after the first meeting of the Congress of the United States, and *within every subsequent term of ten years*" (Federal Constitution, article I, section 2, paragraph 3), and "in the year 1900, and once every ten years thereafter" (section 1, Act of March 3, 1899). Therefore "*the*" Federal census referred to in section 239 of the Banking Law must reasonably be construed to mean "*a*" Federal census, for we cannot accuse the Legislature of tying the operation of the State statute down to a procedure which had no fixed existence under the Federal Constitution or Federal Law. Congress could direct that a Federal census be taken at any time within a ten-year period.

The above point is made to offset any argument that Federal census figures were to be used under the New York Banking Law not only because they were supposedly accurate and readily available, but for the reason that a ten-year period was in the mind of the New York Legislature to make certain that bonds of "mushroom" cities rising above the requisite 45,000 population and falling below it *within a ten-year period*, should be excluded.

Furthermore the Banking Law, section 239, is designed to secure the safety of savings bank investments. Population has the least effect upon the safety of bonds of any of the restrictive provisions of the investment law. One inhabitant may turn the tide one way or the other. We should not therefore attempt to construe the statute so strictly as to exclude a city which complies with every other essential requirement of the law, and as to population has in fact over one-third more than the number fixed by the statute. The accuracy of this enumeration of El Paso is stated to be beyond question. In a letter dated February 21, 1916, Hon. William C. Redfield, Secretary of Commerce and Labor, says:

"It is true that the enumeration in question was made by the Federal government; that it was lawfully authorized; and that as all the formalities as to enumeration, tabulation, secrecy, etc., which were employed in the taking of the decennial census of 1910 were strictly observed, the accuracy of the enumeration is beyond question."

The special census of January 15, 1916, upon order of the President was therefore a Federal census and to all intents and purposes "the Federal census next preceding" the making of the investment. "The" as used before the word Federal census was apparently placed there to distinguish between the next preceding State census and the next preceding Federal census and not to mark out a particular Federal census.

People ex rel. Carter v. Rice, 135 N. Y. 473, has considerable bearing upon the interpretation I have given to the Banking Law. Section 5 of article III of the Constitution of 1846, as amended in 1874, provided that the Legislature should "at its first session after the return of every enumeration" apportion the assemblymen to the various counties. The objection was raised that the apportionment of 1892 was unconstitutional because made at a special session of the Legislature following the enumeration of 1892, and not at the first regular session following such enumeration. The objection was disposed of by the Court of Appeals in the Carter case in the following language:

"The point is made that an extraordinary session is not such a session of the Legislature as is contemplated by the Constitution. To my mind the objection is wholly without force. An extraordinary session is, nevertheless, a session of the Legislature. The Governor, by the terms of the Constitution, has 'power to convene the Legislature (or the senate only) on extraordinary occasions.' When thus convened, is not the Legislature in session? And can it be for a moment correctly contended that a session thus convened is the same session which had already terminated by an adjournment without day? It is not a regular session, it is true; it is what the Constitution describes it, an extraordinary session, but yet a session of the Legislature. The Constitution does

not say that the session which is to deal with the question must be a regular one. All it directs is that the Legislature at the first session after the return shall proceed to make the alterations.

There is no basis, in the language of the Constitution, for the claim that the session of the Legislature referred to in that instrument is the first session of the Legislature which itself first convenes after the return of the apportionment. The Constitution does not say so, and I fail in finding any reason in principle or *in the nature of the subject* which calls for such a construction."

Likewise in the ascertainment of the population of any city under section 239 of the Banking Law it would seem that in the nature of things the purpose of the statute would be as well served by a special census as by a general census so long as both were conducted under authority of the Federal government; and the Legislature could have had no incentive to make a discrimination (between a special and a general census) which accomplished no perceivable benefit to the security of the bonds.

In my opinion the special Federal census figures may be used; and bonds of the city of El Paso, Texas, have become legal investments for savings banks of the State.

Dated, April 10th, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. EUGENE LAMB RICHARDS, *Superintendent of Banks,*
Albany, N. Y.

ERROR ARISING IN APPORTIONMENT OF TAXES IN RENSSELAER COUNTY—
EXCESS LEVY — REFUND TO TAXPAYERS — TAX LAW, §§ 58, 84 — COUNTY
LAW, §§ 12, 16, 242.

The existing laws do not adequately afford relief in the matter of the excess tax erroneously levied in the County of Rensselaer and therefore special legislation is required.

STATEMENT

Through an error of the Board of Supervisors of Rensselaer county in apportioning to the various towns of that county the

amounts to be raised therein by tax in the year 1916, approximately \$156,000 has been collected from the taxpayers throughout the county in excess of the amount required for State, county and town purposes. The county budget contained the correct total amount needed for the support of government, and that amount was levied by resolution of the Board of Supervisors December 10, 1915, but in apportioning this amount among the towns, the items:

State tax	\$155,121 29
Troy tax clerk.....	1,200 00
Appropriation for the blind.....	44 58
<hr/>	
\$156,365 87	
<hr/>	

were erroneously included twice, thus increasing the tax in the county by the above indicated excess sum. It results that the people of the county have been called upon to contribute \$156,000 more than was their legal obligation, and of this amount about 95 per cent., I understand, has been collected and paid into the county treasury.

INQUIRY

The County Treasurer has inquired of the State Comptroller whether:

1. He would have a right to use this \$156,000 to pay quarterly audits.
2. Whether he would have a right to hold this \$156,000 until the next tax levy is made up and then credit each taxpayer next year with the excessive amount collected this year.
3. Whether the whole tax levy, or if not, whether any portion of the same, is illegal, as distinguished from merely an excessive tax.
4. Whether in any event, he should not have a legalizing act of the Legislature passed legalizing whatever steps he is advised and deems most proper to take in relation to this excess of \$156,000.

OPINION

Counties are governmental subdivisions of the State. Upon the legislative body of each county, namely, the Board of Super-

visors, has been placed the duty of including the State tax in the yearly levy of taxes for the county. Section 58 of the Tax Law provides:

“ § 58. LEVY OF TAX BY SUPERVISORS. The Board of Supervisors of each county shall, at its annual meeting, levy the taxes for the county, *including the State tax*, upon the valuations as equalized by it * * *.”

The Legislature has also delegated to the counties the power to raise moneys to conduct the governmental affairs of the county, and has impressed duties upon the Board of Supervisors in this respect. Section 242 of the County Law prescribes that:

“ *The moneys necessary to defray the county charges of each county shall be levied on the taxable property in the several towns therein, in the manner prescribed in the general laws relating to taxes; and in order to enable the county treasurer to pay such expenses as may become payable from time to time, the Board of Supervisors shall annually cause such sum to be raised in advance in their county, as they may deem necessary for such purposes.*”

By the following subdivisions of section 12 of the County Law, other general powers and duties of the Board of Supervisors with regard to taxation are set forth:

“ § 12. The Board of Supervisors shall:

* * * * *

2. Audit. Audit all accounts and charges against the county, and *direct annually the raising of sums necessary to defray them in full.*

3. Town charges. *Annually direct the raising of such sums in each town as shall be necessary to pay its town charges.*

4. Taxes. *Cause to be assessed, levied and collected, such other assessments and taxes as shall be required of them by any law of the State.*”

Counties through their Boards of Supervisors (recognized as constitutional bodies, Constitution, article III, sections 26, 27),

no doubt possess as do cities, towns and villages a home rule power of taxation for local purposes. (City of Albany v. Hooker, 204 N. Y. 1; Village of Pelham v. Town of Pelham, 215 N. Y. 374.)

We look in vain through the State statutes for any authority in the Board of Supervisors to collect a sum for State taxes over and above the amount certified by the Comptroller to the Board of Supervisors. We need look nowhere else for a source of power in the counties to collect State taxes, for obviously enough no home rule power of a county could authorize the imposition of a State tax and its collection.

Nor does a home rule power, broad as it may be, extend to the levy or collection of a local tax which the records themselves disclose is absolutely unnecessary for local purposes. Therefore the balance, \$1,244.58, of the excess tax above the amount collected the second time for the State tax, was also illegal. The supervisors were therefore entirely without jurisdiction to authorize the collection of any portion of the excess tax, and the same is wholly void.

Having determined that the excess tax was illegal, we are brought to a consideration of remedial methods open to the county or to the taxpayers.

The County Law, section 16, empowers the Board of Supervisors of any county upon the application of a taxpayer to refund to such taxpayer the amount of any tax illegally or improperly levied:

“ § 16. CORRECTION OF ASSESSMENTS, AND RETURNING AND REFUNDING OF ILLEGAL TAXES. Any such board may correct any manifest clerical or other error in any assessment or returns made by any one or more town officers to such board or which may, or shall have properly come before such board for its action, confirmation or review; and *cause to be refunded to any person the amount collected from him of any tax illegally or improperly assessed or levied*, and upon the order of the county court, it shall refund any such tax.”

The taxpayer may also avail himself of the common law action for money had and received to recover the illegal and therefore the unjust tax. (Aetna Insurance Co. v. The Mayor, 153 N. Y. 331; Tripler v. The Mayor, 139 N. Y. 1.)

In neither proceeding, the application under the County Law or the common law action, can the taxpayer recover the amount of his illegal tax if the same has been voluntary paid.

The rules governing the law of voluntary payment have been quite recently reiterated by the Court of Appeals in *Matter of Village of Delhi*, 201 N. Y. 408, 414:

“Where an assessment is void on its face and a person without duress in fact pays the tax levied upon such assessment, it is a voluntary payment and cannot be recovered under section 16 of the County Law. (*Matter of McCue v. Supervisors of Monroe Co.*, 162 N. Y. 235; *Matter of Reid*, 52 App. Div. 243; *Matter of Gardner*, 52 App. Div. 625, affd., 167 N. Y. 621; *Toal v. City of New York*, 34 Misc. Rep. 18; affd., 67 App. Div. 619; *Matter of Village of Medina*, 52 Misc. Rep. 621; affd., 121 App. Div. 929.)

“Where an assessment although valid on its face, but in fact illegal and void, is paid by a person with knowledge of the facts which render the assessment void and without duress in fact it is a voluntary payment. (*Haven v. Mayor, etc. of N. Y.*, 67 App. Div. 90; affd., 173 N. Y. 611; *Tripler v. Mayor, etc. of N. Y.*, 125 N. Y. 617.)”

Assuming a tax is not void on its face, what constitutes a voluntary payment which will prohibit a recovery of the tax, has by the more recent decisions been defined to be a payment when the taxpayer is possessed of full knowledge of the facts which would show the tax to be an illegal one. The rule is applied broadly in favor of the taxpayer. Ignorance of the existence of a statute has been held to be a mistake of fact, not of law, which will afford the taxpayer relief. (*Tripler v. Mayor*, 139 N. Y. 1; *Matter of Village of Delhi*, 201 N. Y. 408.)

It was the lack of knowledge of a fact, namely, the erroneous insertion of the excess amounts in the apportionment sheet, which I believe has constituted the payment by the taxpayers of Rensselaer county an involuntary one.

The tax was not *apparently void*. An inspection of the assessment roll would not have disclosed the illegality of the tax. And although the taxpayer is usually charged in law with knowledge

of what the public records (of the Board of Supervisors) contain, an inspection of those records would have disclosed no jurisdictional steps which would have made the assessments void, other than the clerical error of including the State tax and the other items twice. Lack of knowledge of an error of this nature will, I believe, be construed to be a lack of knowledge of a fact; and the taxpayer not chargeable as a matter of law with knowledge of the existence of such fact. There was a mutual ignorance of fact upon the part of the Board of Supervisors and the taxpayer, and relief ought to follow. (*Betz v. City of New York*, 119 A. D. 91; *affd.*, 193 N. Y. 625; *Aetna Insurance Co. v. Mayor*, 153 N. Y. 331; *Matter of Edison Illuminating Co.*, 22 A. D. 371; *affd.*, 155 N. Y. 699; *Jex v. Mayor*, 103 N. Y. 536; *Mutual Life Insurance Co. v. Mayor*, 144 N. Y. 494.)

If I am so far correct the taxpayers who have paid their taxes have a remedy either under section 16 of the County Law, or by an action for money had and received to recover from the county the excess tax collected.

Furthermore I am of the opinion that the Legislature could not by a curative statute defeat the taxpayer's right of recovery by directing that these moneys be retained by the county and credited upon next year's taxes. I have not overlooked in arriving at this conclusion that line of authorities in which the courts uphold a power in the Legislature to cure assessment proceedings which are void because of the omission of proper jurisdictional steps upon the part of the assessing officers. But those were cases in which the Legislature had power in the first instance to direct the various jurisdictional steps. Here no legislative power at any time existed to direct the collection of taxes which were clearly not needed for public purposes. In the often quoted phrase of Judge Finch in *People ex rel. Barnard v. Wemple*, 117 N. Y. 77, 85, "it is impossible to cure what never had life enough to be sick." For other instances of the application of the same principle see *People ex rel. Hays v. Brooklyn*, 71 N. Y. 495; *Cromwell v. MacLean*, 123 N. Y. 474, 490; *Ne-ha-sa-ne Park Association v. Lloyd*, 7 A. D. 359; *VanDeventer v. Long Island City*, 139 N. Y. 133, 136; *Meigs v. Roberts*, 162 N. Y. 371, 378; *Wallace v. McEchron*, 176 N. Y. 424, 429; *Bryan v. McGurk*, 332, 336. The retention of

the taxpayers' money under the circumstances presented in Rensselaer county would be a taking of property without due compensation and denying the equal protection of the laws. Many who are taxpayers to-day will not be to-morrow. This is particularly true of those paying a personal property tax and who may have been taxed in Rensselaer county under this levy but who may not be subject to a tax next year or may move out of the county of Rensselaer into some other county where they would be unable to get credit for their advance payment and would be subjected to double taxation.

It does not impress me that section 84 of the Tax Law is an authority for the retention of these moneys, wherein it provides that:

"If any greater amount of taxes shall be levied in any town than the town charges thereof, and its proportionate share of the State taxes and county charges, the surplus shall be paid by the collector to the county treasurer, who shall place it to the credit of such town, and it shall go to the reduction of the tax upon the town for the succeeding year."

If the above language was designed to authorize the retention of moneys of the taxpayers illegally obtained, I believe the statute would be unconstitutional. Section 84, however, may be read in harmony with the refunding provisions of section 16 of the County Law, and be construed to mean that the excess moneys collected in any town be turned over to the county treasurer, and so much of them as have not been refunded to the taxpayers be credited the next year to the town.

In conclusion on this branch of the subject I should advise you that the excess tax should be returned to the taxpayer only if he applies for it under section 16 of the County Law or institutes an action for money had and received. Otherwise the tax need not be refunded.

As to the procedure which should be followed where the tax has not been paid several observations may be made. The property of the taxpayer cannot be sold. If any part of a levy is void a sale for the whole tax is void. (People v. Hagadorn et al. v. Lloyd 104 N. Y. 516, 524; Ne-ha-sa-ne Park Association v. Lloyd, 167 N. Y. 431; Poth v. Mayor, 151 N. Y. 16.)

Section 16 of the County Law confers upon the Board of Supervisors a limited power to correct assessments:

“ § 16. CORRECTION OF ASSESSMENTS, AND RETURNING AND REFUNDING OF ILLEGAL TAXES. Any such board may correct any manifest clerical or other error in any assessment or returns made by any one or more town officers to such board, or which may, or shall have properly come before such board for its action, confirmation or review; and cause to be refunded to any person the amount collected from him of any tax illegally or improperly assessed or levied, and upon the order of the County Court, it shall refund any such tax.”

The above power to correct has been held to be operative only prior to the levy of the tax. Thereafter jurisdiction to correct the records has been lost. (Matter of R. M. G. I. Co., 144 N. Y. 228, 233.)

We find then that while there may be relief by way of a refund to those who have paid their taxes, there is no machinery for a cancellation of the excess tax before payment so as to permit a valid tax sale in the cases where the taxes are not paid or the taxpayers refuse to pay them. And there is not only no statutory remedy giving complete relief in this regard but the method of refund prescribed by section 16 of the County Law was intended without doubt to cover isolated cases of error, and not any such error as this, affecting the entire levy of a tax. The method is cumbersome and not well suited to meet such a situation. It might lead to innumerable litigations because quite likely a question of fact might be injected into each case of refund as to whether the taxpayer had made a voluntary payment of his tax or not.

In view of all the facts I am of the opinion that the entire matter should be the subject of special legislative action to be passed as soon as possible, authorizing the county treasurer to pay back the excess tax to the persons entitled to the same and authorizing the Board of Supervisors to meet and correct the levy of the tax for the purpose of giving the county the right to enforce the collection of the taxes which remain unpaid.

It has occurred to me to say that while it would not in my opinion be constitutional to pass an act simply authorizing the

erediting of all these excess taxes in reduction of the taxes of next year, it would not be improper to so provide with reference to so much of the excess moneys as have not been refunded, if the Legislature opens the door to an application for a refund to all who desire to take advantage of it, after publication of due notice and allowing a reasonable period thereafter for making such application.

Answers to all the questions are I think contained in the foregoing discussion, though the questions for convenience are not approached in the form set forth in the inquiry.

Dated, April 10th, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon EUGENE M. TRAVIS, *State Comptroller, Albany, N. Y.*

TOWN LAW, § 81 — EDUCATION LAW, § 232 — SCHOOL TRUSTEE — SUPERVISOR
— COMPATIBILITY.

A school trustee may be elected supervisor, but, by accepting that office, he vacates his office as school trustee.

INQUIRY

May a school trustee be elected to the office of supervisor?

OPINION

In the case of People v. Purdy, 154 N. Y. 439, it was held that:

"a school trustee is not only incapable of holding the office of supervisor, *but also of being elected to that office.*"

Accordingly, this department in 1911, following that case rendered an opinion that a school trustee, even by resigning as trustee after his election as supervisor, could not retain the office of supervisor. However, the present validity of the Purdy case has been destroyed by the decision in People ex rel. Martin v. Kenyon, 152 App. Div. 898 (Fourth Department, 1912), affd. without opinion in 207 N. Y. 692.

It has been difficult to ascertain the Court's view of the law of that case, since all we have as an opinion is the dissenting memor-

andum of Mr. Justice Robson, in which Mr. Justice Kruse concurred. However, upon examination of the briefs of counsel and after correspondence with the attorneys representing this department, which appeared only formally in the case, I am convinced that both the Appellate Division and the Court of Appeals determined that the Purdy case is no longer applicable.

The successful argument went on a construction of these two statutes.

Town Law, section 81. “* * * No * * * trustee of a school district shall be eligible to the office of supervisor in any town or ward in this State.”

Education Law, section 232. “A trustee or member of a board of education *vacates* his office by acceptance of either the office of school commissioner or supervisor.”

This last provision, not before the Court of Appeals in the Purdy case, it was argued, repealed the express prohibition contained in section 81 of the Town Law. Under the law of the Kenyon case, therefore, a school trustee may be elected supervisor. It seems, however, that he should resign as trustee before entering on his duties as supervisor in order to remove all question that he claims any powers as trustee.

Dated, April 10th, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. FRANK B. GILBERT, *Chief of the Law Division, Department of Education, Albany, N. Y.*

COUNTY LAW, § 45 — PUBLIC HEALTH LAW, § 319 — REFERENDUM RENSSELAER COUNTY TUBERCULOSIS HOSPITAL.

The Board of Supervisors of Rensselaer County has power to repeal a resolution providing for the establishment of a county tuberculosis hospital, and to submit the question by referendum to the people.

FACTS

As submitted by the clerk of the Rensselaer County Board of Supervisors and the State Health Department:

On November 23d, 1915, there was submitted to the Board of Supervisors of Rensselaer county a resolution providing for the establishment of a county tuberculosis hospital in the town of North Greenbush in that county, under section 45 of the County Law, as amended by chapter 427 of the laws of 1915. This was adopted on November 26th, 1915, by a vote of 19 to 5. (Proceedings of 1915, pp. 347, 560.) The resolution recites that a new site be procured for what was "commonly known as the Lakeview Sanitorium, devoted to the care of Rensselaer county tubercular patients." Previously, on July 12, 1915, under section 319 of the Public Health Law, a hearing had been held on petition of the Rensselaer Board of Supervisors, and the location of a site in the town of North Greenbush, on the Film and Walsh farms was "permitted" by the Deputy State Commissioner of Health, and the local health officer. It does not appear that the Lakeview Sanitorium as originally conducted was established under the provisions of law providing for county tuberculosis hospitals, and apparently the hospital projected by the resolution was an entirely new establishment. Apparently, no appropriation was made under the resolution, although it provided that the cost of the buildings shall be approximately \$150,000. The resolution goes on to provide for the adoption of the same site approved by the Deputy Commissioner of Health; the appointment of Mr. L. N. Milliman as architect at a fixed compensation; advertising for bids; letting of a contract with sureties and a committee of supervision.

INQUIRY

May the present Board of Supervisors repeal the resolution and submit the question of building a hospital to the people of the county?

OPINION

There is no principle more firmly established than that "acts of parliament derogatory from the power of subsequent parliaments bind not." This presumption against irrepealable laws has been carried far; as witness the case of *Richmond County Gas Light Co. v. Middletown*, 59 N. Y. 228. A board of supervisors is a legislative body. Indeed, the State Constitution, in article

III, section 27, specifically authorizes the Legislature to confer "further powers of local legislation" on the boards. See also, *People ex rel. O'Connor v. Supervisors*, 153 N. Y. 370.

However, a board of supervisors also has other powers which the Courts have defined as judicial and as administrative. Now it is well settled that judicial action once determined within the bounds of jurisdiction may not be reopened. See 1912 Attorney-General's report, p. 241, for discussion and cases in connection with the State Board of Tax Commissioners. Unfortunately, in all the cases submitted to the Courts, the action sought to be reversed or modified had aspects apparently not legislative, and accordingly the judges have denied or narrowly limited the power of the boards. (*People ex rel. Caldwell v. Supervisors*, 45 App. Div. 42; *People ex rel. Lawrence v. Supervisors*, 48 App. Div. 428; *People ex rel. Hovey v. Ames*, 19 How. Pr. 551; *People ex rel. Thomson v. Supervisors*, 35 Barb. 408; *Supervisors v. Bowen*, 4 Lans. 24; *People ex rel. Birch v. Mills*, 32 Hun, 459; *People ex rel. Donnelly v. Riggs*, 19 Misc. 693; *In re B. M. G. L. Co.*, 144 N. Y. 228.)

I find nothing in the rules of the Rensselaer Board of Supervisors or in the statutes expressly recognizing or authorizing reversal of action, with the exception of a rule as to limited "reconsideration." However, if the action of the board in the case now submitted was legislative and not judicial I believe express statutory authorization is unnecessary, and that the presumption of power to repeal would give the present board the right to reconsider the previous action. It may be urged that the Legislature under its power to confer legislative powers has not expressly given the power to repeal. However, I think this is immaterial, since a legislative power once granted presumably will be exercised as ordinarily. "The new board stands in the shoes of the old," and consequently, as a continuing body, it is of little moment that the personnel of its membership may have changed. (*Supervisors v. Bowen*, 4 Lans. 24 *supra*.)

I think the action of the board in performing the wholly public function of providing a hospital for the county may be distinguished from the cases above cited where the acts of the board invariably touched directly the rights of individuals. The right to

the refund of a tax, or a proper apportionment thereof, the inviolability of a contract, or the settlement of a personal claim are unquestionably far different than the carrying out of a governmental project and the appropriation of money therefor. In *People ex rel. Thomson v. Supervisors (supra)* Judge Potter expressly recognized the legislative powers of supervisors while, at the same time, denying their right to reverse judicial action. The resolution establishing the hospital was as much legislative as a statute establishing a State institution, abolishing the health office of the port of New York, or a resolution establishing a fire district. (*Re Rockaway Park Improvement Co.*, 83 Hun, 263.)

When we come to examine what was actually done by the board in this case, there is strong indication that the action was tentative only, void in some respects and defeated by failure to proceed.

In the first place, the site of the hospital was never properly approved. Under section 319, the State Commissioner of Health and the local health officer constitute a board to approve the establishment of a tuberculosis hospital. However, the Deputy State Commissioner sat on this board. The action was necessarily null and void since the commissioner himself was bound to personally sit. It was so held by the Appellate Division, Third Department, this January in *People ex rel. Buckbee v. Biggs et al.*, in an opinion by Mr. Justice Woodward. If the site had been properly approved difficult question might be presented, since the approval of the State and local health officers, under section 319 of the Public Health Law, "is final and conclusive."

The resolution is clearly an extension or amendment of one adopted by the board July 13th, 1915. (Proceedings, page 210.) Yet neither the first resolution nor the second complies with section 17 of the County Law, requiring that "every act or resolution of such board in the exercise of its Legislative power shall have a title prefixed concisely expressing its contents followed by a reference to the law or laws conferring the authority to pass the act or resolution * * *."

Next observe the statute under which the supervisors acted (County Law, section 45, as amended in 1915). It is required that:

"When the board of supervisors of any county shall have voted to establish such hospital, or when a referendum on the proposition of establishing such a hospital in a county, as authorized above, shall have been carried, the board of supervisors shall:" * * *

(1) acquire a site, (2) erect buildings, (3) obtain funds, (4) appoint managers, (5) accept any gifts. This, however, is not so strongly worded as that provision of the statute referring exclusively to the action to be taken after the adoption by the people of a referendum. There it is provided that:

"If a majority of the voters voting on such propositions shall vote in favor thereof then such hospital shall be established hereunder and the sum of money named in the said proposition shall be deemed appropriated, and it shall be the duty of the board of supervisors to proceed forthwith to exercise the powers and authority conferred upon it in this section."

Apparently, reconsideration is expressly withheld where a referendum is adopted and the acts of the board then are not legislative, as in *Stanton v. Supervisors*, 112 App. Div. 877 (Third Department). That case seems to recognize that when the board acts alone without recourse to a referendum in locating county buildings the act is legislative.

However, so far as I can find, nothing was ever done except to acquire an unauthorized site and to direct the making of an architect's contract. No appropriation of money has been pointed out to me, and I am advised that no buildings have been erected, gifts received or management provided. The whole project halted, as indeed, it would have to, pending lawful approval, since even the site was not acquired in the manner provided by the statute.

The supervisors now suggest that they adopt the alternative method provided by the County Law, in deciding upon the erection of a hospital by submitting the question to the source of all power — the people. Except in so far as rights of individuals have vested, it is my opinion that they have this power. The rights of outside parties and contracts made with them would, of course,

restrict qualifiedly the power of repeal. In subdivision 6 of section 45 of the County Law, power is expressly given to the board of supervisors to change the site and erect another hospital. Surely, if this power exists after the hospital is completed, it must exist, even by implication, before anything has been done.

As was indicated at the outset, owing to the lack of judicial determination, the solution of the question relating to the right of repeal is not free from doubt. However, even if it should be determined that this power does not exist, still, I believe that the circumstances surrounding the resolution from its inception to the present time would justify the board in treating the resolution as a nullity and without present force or effect.

It is therefore my opinion that the Board of Supervisors of Rensselaer county has power to repeal a resolution providing for the establishment of a county tuberculosis hospital, and to submit the question by referendum to the people.

I might also add that I have considered Assemblyman Prangen's bill, Pr. No. 1309, but find its passage would not affect this situation.

Dated, April 12, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. HERMANN M. BIGGS, *Commissioner of Health, Albany,*
N. Y.

TOWN LAW, §§ 40 AND 82, CHAPTER 231, LAWS OF 1913.

When a change is made in the date of holding a town meeting from the spring to general election day, to take effect in an odd numbered year, the terms of the town officers, in office at the time the resolution is passed, is not extended from the date of the spring town meeting until the first day of January following such general election.

At the first biennial town meeting held in the spring after the adoption of a resolution making such changes a full set of town officers should be elected to hold office until January first following such election.

INQUIRY

When a county board of supervisors changes the time for holding the biennial town meetings in such county under section 40 of the Town Law, from February to the general election day in

November by a resolution passed any time during the year 1916 to take effect at the fall election in 1917, will it be necessary to hold a town meeting in February, 1917, to elect town officers for the period between such February town meeting and the general election of that year, or can the town officers now in office hold over until December 31, 1917.

Second. What is the proper procedure to effect such a change and,

Third. How will the change effect the town superintendent of highways?

OPINION

The board of supervisors of the county of Tioga, by its clerk, asks to be advised as to the procedure which should be adopted by its board to effect a change in the date of holding its town election from February to the date upon which the general election is held, and also whether the present town officers will hold over until the close of the year 1917.

It appears that the town meetings in Tioga county have heretofore been held some time during the month of February in every odd numbered year and that a full set of town officers was elected in February, 1915, for a term of two years, and that now the board desires to change the date of such town meetings so that they can be held biennially with the general election, and first town meeting under such change to be held on the first Tuesday after the first Monday in November, in 1917.

It is provided by section 40 of the Town Law that

“The board of supervisors of any county may by resolution, fix a time when the biennial town meetings in such county shall be held, which shall be either on some day between the first day of February and the first day of May, inclusive, or on the first Tuesday after the first Monday in November of an odd numbered year.”

It is provided by section 82 of the Town Law that the terms of office of supervisors, town clerks, assessors, town superintendents of highways, collectors, overseers of the poor, inspectors of election and constables shall be two years, and in towns where the biennial

town meetings are held between the first day of February and the 1st day of May the terms commence immediately after the town meeting, as soon as the officers-elect have qualified and continues for two years, but where a change is made to a general election day the officers elected thereat shall take office on the first day of January succeeding their election.

Much confusion seems to have arisen in different counties where changes have been made from what have generally been termed "spring town meetings" to a town election to be held at the same time as the general election in the fall in reference to the expiration of the terms of office of those incumbents of the various town offices at the time a resolution was passed providing for such change.

It was held by my predecessor in 1912 (Rep. 1912, pp. 91, 526), that a board of supervisors has no power to so change the time of town meetings as to extend the terms of the supervisors in office at the time of the adoption of the resolution.

In 1913, Mr. Carmody also held (Rep. 1913, page 425), that the term of office of one Pelcher as supervisor, having been illegally lengthened by the action of the Hamilton county board of supervisors in changing the date of town meetings, an action in *quo warranto* would lie to test the title to his office.

In that case a similar condition existed as that which will be brought about if the change is made which is contemplated by the board of supervisors in Tioga county. The board of supervisors of that county (Hamilton) passed their resolution at the November session in 1911, changing the time of holding the town meeting from March to general election day and provided that all officers elected at the town election in November, 1913, should take office on January 1, 1914. A town meeting was held in March, 1913, in one town in the county (Hamilton), and one Perkins was elected supervisor, but Mr. Pelcher, who had been elected in March, 1911, claimed to hold over until his successor should be elected in the following November, 1913, and qualified, and refused to surrender the office of the books and papers and an action was brought to try the title to such office. It was held by the special term in case reported in 81 Misc. 423, that there could have been no town meeting in March, 1913, at which Mr. Perkins could have been elected, and that if any vacancy existed in the office after the ex-

piration of the terms in March, 1913, that Mr. Pelcher could hold the office until such vacancy was filled by the proper authorities or until his successor was elected in November, 1913, the right to hold the office thus being extended about nine months beyond the terms for which such supervisors had been elected.

This decision was afterwards affirmed by the Appellate Division, Third Department, and also affirmed by the Court of Appeals in 210 N. Y. 563, by a divided Court. It seems to be somewhat in conflict with other opinions given by the Court of Appeals, but the opinion is predicated upon the theory that as the law then existed the supervisors elected in March, 1911, were chosen and elected with full knowledge upon the part of the electors, that the terms would be two years and might be extended by action of the board of supervisors for nearly nine months in addition thereto and at page 427 id. 81 Misc. the Court uses the following language:

“ Article 10, section 3, of the Constitution provides ‘When the duration of any office is not provided by this Constitution it may be declared by law.’ The term of office of supervisor is not fixed by the Constitution, but has been declared by the Legislature to be for the period of two years, except the Legislature, prior to the passage of the resolution in question, provided that in case of the adoption of such a resolution changing the time of holding biennial town meetings to the first Tuesday after the first Monday in November, all town officers hereafter elected (that is after the enactment of section 82 of the Town Law, chapter 491, Laws of 1909), should hold office until the first day of January, succeeding the town meeting, held pursuant to such resolution. The extension of the term of office of the supervisors in office when the resolution was adopted was therefore by virtue of the legislative enactment and not simply by resolution of the board of supervisors.

“ In effect the Legislature declared that the term of office of members of a board of supervisors should be for two years unless a resolution was adopted by the board changing the time for holding the town meetings from spring until fall, then and in that case their terms should expire at a different

time several months later than the period of two years. The electors of Hamilton county selected their supervisors with the knowledge that such a resolution could be adopted and the time of the officers elected extended as suggested."

It has been held in several cases that the Legislature cannot extend the term of a town officer after his election.

People ex rel. LeRoy v. Foley, 148 N. Y. 677.

People ex rel. Smith v. Weeks, 176 N. Y. 194.

The final decision by the Court of Appeals in the Pelcher case was rendered on the 16th day of February, 1913, and on the 8th of April, 1913, nearly two months thereafter, chapter 231 of the Laws of 1913, amending section 82 of the Town Law, was enacted which seems to have been passed for the purpose of settling the uncertainty which theretofore existed in reference to the expiration of the terms of town officers when a change should be made in the date of holding a town meeting after the election of such officers, and that part of said act which applies to the point under consideration, reads as follows:

" Except as otherwise provided in this section, in case the time of the holding of town meetings in any county is changed by resolution of the board of supervisors of the county to the first Tuesday after the first Monday in November, all town officers in any town of such county elected at the first biennial town meeting held after the adoption of such resolution shall hold office until the first day of January, succeeding the biennial town meeting first held, pursuant to such resolution. No resolution changing the time of holding town meetings to the first Tuesday after the first Monday in November shall be effectual to dispense with the holding of the first biennial town meeting after the adoption of such resolution at the time fixed when such resolution was adopted. But the collector in each town shall complete the duties of his office in respect to the collection of taxes, and payment and return thereof, upon any warrant received by him during his term of office, notwithstanding the fact that his successor has entered upon the duties of his office."

This amendment appears to settle all doubt and uncertainty as to town officers holding over for eight or nine months after the expiration of their terms, and if a resolution is passed by the board of supervisors of Tioga county at any time before the next biennial town meeting in February, 1917, changing the date of their town election to the date of the next general election, the town officers now in office cannot hold over until the 31st day of December, 1917, but there must be a town meeting at the usual time in February, 1917, for the election of town officers for short terms, to commence immediately after the town meeting in February, and continue until and including the 31st day of December, 1917, and at the town election to be held at the time of the general election in November, 1917, a new set of town officers will be elected whose terms will begin on January 1, 1918, and continue for two years, and the biennial town elections will thereafter be held at the same time as the general elections in November in each odd numbered year.

In reply to the second inquiry, it would appear to be necessary that a resolution changing the date of holding town meetings should be passed with all the formality required by section 17 of the County Law, and should specifically state when the first town election will occur under such change, and should also provide that the officers elected at the next biennial town meeting in February, 1917, shall hold office until the 1st day of January succeeding their election and that biennial town elections will thereafter be held in said county at the same time as the general election on the first Tuesday after the first Monday in November in each odd numbered year.

Such a resolution properly phrased will fully meet the requirements of sections 40 and 82 of the Town Law, as amended by chapter 231 of the Laws of 1913.

The answer to the third inquiry is contained in section 82 of the Town Law which, in part, provides that "the term of a town superintendent of highways, if such superintendent be elected at a town meeting held at the time of a general election, shall begin on the Thursday succeeding his election or as soon thereafter as he shall have been officially notified of his election and shall have duly qualified."

It follows therefore that if a resolution is adopted by the board of supervisors in 1916, providing for a change of the date of holding the town election to the general election day in November, 1917, that the town superintendent of highways elected at that time shall take office on the following Thursday after his election, or as soon thereafter as he shall have qualified for such office, and will hold by force of statute until his successor shall have been elected and qualified at the election in November, 1919, and as the town superintendents in such towns that were elected in February, 1915, hold their offices until the 1st day of November, 1917, by virtue of both the town and highway law, the superintendents elected at the next biennial town meeting in February, 1917, will have but a very few days to serve under such election, that is, from the 1st day of November until the Thursday succeeding the election or until their successors elected at the general election in November, 1917, shall have been duly notified and qualified.

Dated, April 27, 1916.

E. E. WOODBURY,
Attorney-General.

To THE BOARD OF SUPERVISORS, *Tioga County, Owego, N. Y.*

HIGHWAY LAW, § 45.

A town board is not authorized to make a per diem allowance to the Superintendent of Highways in lieu of actual and necessary expenses.

A town board is not authorized to pay a town Superintendent of Highways for the use of his own automobile, but may allow him for the actual amount expended by him in the purchase of gasoline and oil for such automobile when he is engaged upon official business in the line of his work.

INQUIRY

1. May the town board of a town of this State lawfully make the town superintendent of highways or his deputy, or both, a per diem allowance to be paid in lieu of actual and necessary expenses?

2. May such a town board allow such officers a fixed rate per mile for the use of their own automobile?

OPINION

I am informed that in many towns of the State it is the practice of the town board to allow the town superintendent of highways or his deputy, if he has one, a fixed sum daily in lieu of expenses, and the question arises, is such practice legal and can it be upheld?

The sole authority of a town board to audit anything to a town superintendent of highways is found in section 45 of the Highway Law, which provides that the town board shall fix the compensation of a superintendent of highways, and his deputy, if one be appointed, at not less than two nor more than five dollars per day, and that "Such town superintendent and his deputy, if any shall be paid the actual and necessary expenses incurred by them in the performance of their duties, * * * such accounts for compensation, together with accounts for expenses incurred by such town superintendent and his deputy, if any, verified as above provided, shall be subject to audit by the town board at its meeting held annually for the audit of accounts of town officers. * * *"

The language of this section is plain and unmistakable, and there must be two facts established before a town superintendent is entitled to have anything audited to him for expenses, viz.: The expenses must not only be actually incurred but they must be necessarily incurred in the line of his official duties. It is one of those safeguards thrown about this class of expenditures to protect the town against the greed and avarice of such officers as might be inclined to pad or fabricate their accounts by items that are in excess of what they have actually and necessarily incurred while engaged in town work.

"Actual" means real, as distinguished from constructive, visionary or fabricated, and it was very clearly the intent of the Legislature that such expenses should be allowed as the officer actually incurred and to limit him to those expenses alone. It must be assumed that each town board will fix the compensation of their town superintendent at a fair and reasonable amount, having due regard to the work, and the condition of the town and highways therein, and if he is given, in addition to his per diem allowance, an amount which will fully reimburse him for all sums which he

has actually expended while prosecuting his official work, I am unable to see how he can complain. The statute appears to be fair and reasonable, and the intent of the Legislature is clear and manifest and every town superintendent who accepts the position takes it with full knowledge that he can only be reimbursed for the expenses he has actually incurred, and to allow him in the face of the statute, a certain sum "as expenses" for each day in lieu of actual and necessary expenses would be a clear violation of the provisions of the statute. A municipality is not bound to pay the expenses of its public officials unless there is some statutory authority for such practice, as the salaries and wages of such officers are generally fixed at an amount which is deemed fair and reasonable, and of sufficient amount to cover their expenditures, and where there is statutory authority for the allowance of expenses in addition to salary it must be strictly followed.

It may require a little more bookkeeping on the part of a superintendent to enter each item of expenditure as it is made, and then again include it in an itemized statement to be presented to the town board for audit, than it would to simply enter a certain amount for each day's expenses in his statement, whether he had actually expended that amount or not, but the former method would be strictly according to statute, and honest, and the latter would not conform to the law, and might be grossly erroneous.

There are several statutes where a certain amount is provided by the Legislature to an officer in lieu of all expenses, and in such a case it would be perfectly proper to allow it to be paid at a certain amount per day, week, month or quarterly, for it is clearly within the contemplation of the Legislature that the officer should receive the amount so specified which shall be in full of all expenses.

If a certain amount should be fixed by a town board to be paid per day in lieu of expenses the superintendent would be claiming it and drawing it without regard to the fact as to whether he had spent that amount or not, and such a provision would not only be violative of both the spirit and letter of the statute, but would lead to abuses in making out claims, as the affiant is required to swear that he has actually and necessarily expended the amount.

named in the bill, when in fact, he may have not spent the full amount in any one day or perhaps any of it, if he is allowed to collect a certain amount per day in lieu of expenses.

I cannot fully agree with the position taken by the Highway Department that the town board shall fix the allowances of the superintendent for expenses, as the expense allowances are fixed by the fact of actual and necessary expenditure, and while the town boards are required to audit the bills, they would have no authority to reduce the items of actual and necessary expenses of a superintendent if no more was claimed than had been expended, and if a correct bill properly verified was reduced by a town board the officer could easily have it corrected by a review of the same in the Courts, by certiorari. A town board would have no authority to disallow an item of expense which had been actually and necessarily incurred, but if any such items could be shown to be erroneous or overcharged, it would be equally the duty of the town board to disallow it to the extent that it was wrongly stated, but the statute directs that he shall be reimbursed for all actual and necessary expenses and a town board has no authority to disobey the plain mandate of the statute and could not lawfully cut an account below the actual expenditure.

I think abuse would be more liable to creep into the accounts if a superintendent was allowed a certain amount per day in lieu of expenses, than there would be by requiring such officers to conform to the statute, even if their accounts are only audited once a year. An arrangement as suggested by the question might be made that would be fairly equitable as between the officer and the town, but it would not be legal, and a statutory officer is required to exercise the function of his office as prescribed by the statute.

After giving the subject thorough consideration, I am forced to the conclusion that a town board cannot lawfully make a town superintendent of highways an allowance to be paid in lieu of actual and necessary expenses.

In answer to the second inquiry, I desire to say that while it would be fair and equitable as between the town and superintendent of highways, that he should be paid for the use of his own automobile while engaged upon official work, if the wear and tear thereof could be accurately measured. It has been a long estab-

lished rule of practice in this State that if a trustee or public official uses his own conveyance in the discharge of his duties, he is not entitled to compensation for such use, but I think his actual expenditures for gasoline and oil used upon his trips while at work for the town, would be a legitimate charge against the municipality. By using his automobile the superintendent adds to his general efficiency, and the value of his service to the town are proportionately increased, and the amount of both gasoline and oil can be definitely ascertained, and are actual and necessary expenses incurred by him in the line of his work and are therefore proper charges against the town, and should be paid upon a verified statement of the amount so used when he is absent from home on official work.

I do, therefore, answer your second inquiry in the negative, except as to the superintendent's actual expenditures for gasoline and oil used by him while at work for the town.

Dated, April 30, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. EUGENE M. TRAVIS, *Comptroller, Albany, N. Y.*

IN THE MATTER OF THE CONSTITUTIONALITY OF THE BILL PROVIDING FOR THE CENSORSHIP OF MOVING PICTURES.

The Censorship bill (introductory Senate No. 94, Assembly reprint No. 2077) introduced by Senator Cristman does not represent an unconstitutional delegation of legislative power.

The Moving Picture Censorship bill establishes a Board of Censorship of moving pictures, to be appointed by the Regents, and authorizes such Board to approve such pictures as are found by it to be "moral and proper" and to disapprove of those it finds to be sacrilegious, obscene, indecent or immoral or tending to debase or corrupt the morals," and makes it "unlawful for any person, firm or corporation to exhibit any moving picture after August first, nineteen hundred and sixteen, unless the film or reel therefor shall have been approved by the board." It further provides that: "The regents may, in their discretion, by majority vote, revoke such approval of any such film or reel at any time."

Held, that so far as the action of the Board of Censors is concerned, the bill declares the policy of the law and fixes the legal principles which are to control their actions, and is a constitutional delegation of authority to ascertain the facts and conditions to which the policy and principles apply, and is not an unconstitutional delegation of legislative power.

Held further, that assuming that the authority which is granted to the Regents to revoke an approval "in their discretion," confers arbitrary power without the limitations of the power prescribed for the Board of

Censors and is otherwise unconstitutional, the censorship by the Regents is an added censorship which is severable from the rest of the bill and if declared to be unconstitutional by the courts, may be stricken out without impairing the force and effect of the censorship by the Board of Censors.

The Board of Censors acts judicially in making its decisions, which are, therefore, reviewable in the courts by certiorari even though no right to review is expressly conferred by the statute.

The provision of the bill that "no fee shall be required for such examination, nor for a duplicate or duplicates, of any film to be used in any miniature motion picture machine for educational, social or church purposes, where the film is of a size and perforation differing from the standard as used in theatrical machines," is not an unconstitutional provision denying the equal protection of the laws.

Hon. Charles S. Whitman, Governor, submitted an inquiry as to the constitutional objections presented in opposition to the Cristman bill, Senate No. 964, Assembly reprint No. 2077, in relation to the regulation of moving picture exhibitions by a Board of Censors.

The bill in question proposes to add a new article, 48, to the Education Law, establishing a State Board of Censors to be known as "Moving Picture Censors" to be appointed by the Regents and to have the following powers and duties as prescribed by section 1251 of the proposed article:

"§ 1251. POWERS AND DUTIES OF THE BOARD OF CENSORS. The board of censors shall cause to be examined, by its members or agents, all moving picture films or reels, and report to the Regents its approval of such films or reels as it shall find to be moral and proper and its disapproval of such films or reels as it shall find to be sacrilegious, obscene, indecent or immoral or tending to debase or corrupt the morals. Each report submitted shall be accompanied with the film or reel to which it relates. Upon each moving picture film or reel having the approval of the board, there shall be placed the words 'approved by the board of censors of the State of New York,' accompanied with the date of such approval and a serial number, to be assigned thereto by the board. Such words, date and number shall be made part of the film, at the end thereof, in such manner that they may be displayed on the screen or surface on which the picture is shown, at the conclusion of the exhibit of the picture or pictures from such film, for at least six seconds. The Regents may, in their dis-

cretion, by majority vote, revoke such approval of any such film or reel at any time. Such revocation shall be complete upon personal service of notice of such application upon the proprietor of such film or reel or upon any agent of such proprietor having charge of the leasing, sale or exhibition of any such film or reel. Subject to the supervision and control of the Regents, the board of censors shall have general power and authority to supervise and regulate the display of all moving picture films or reels in all places within the State. Such power and authority shall include the power to inquire into and investigate, and to have displayed for the benefit of such board or of the Regents, the moving picture films or reels intended to be displayed."

Section 1252 makes it the duty of those intending to exhibit or permit the use of films for exhibitions, to furnish to the board descriptions thereof and display the same for examination by the board or by the Regents.

Section 1253 provides in part as follows:

"It shall be unlawful for any person, firm or corporation to exhibit any moving picture after August first, nineteen hundred and sixteen, unless the film or reel therefor shall have been approved by the board under the provisions of this article, nor unless the words, date and number placed thereon by the board of censors, and the identification matter in the case of a duplicate, are displayed on the screen or surface on which the picture is shown for at least six seconds at the conclusion of the picture."

Section 1252 provides for the giving of bonds by the members of the Board of Censors and for the payment of the expenses of such members in carrying out the provisions of the article.

Section 1255 relates to records and reports of examinations and of approvals and disapprovals, and of the expenses and receipts in carrying out the provisions of the article.

Section 1256 prescribes the examination fees to be paid and concludes with the following paragraph:

"Provided, however, that no fee shall be required for such examination, nor for a duplicate or duplicates, of any film to be used in any miniature motion picture machine for educational, social or church purposes, where the film is of a size and perforation differing from the standard as used in theatrical machines."

The object of this memorandum is to consider the constitutional objections presented in opposition to this bill.

It has been admitted by Judge Cullen that the proposed statute cannot be condemned on the ground that the subject of regulation of the exhibition of moving pictures and the creation of a Board of Censors to examine such pictures and forbid their exhibition if improper is beyond legislative regulation and control, citing the recent decision of the United States Supreme Court in Mutual Film Co. v. Industrial Commission of Ohio, 236 U. S. 230. But it is contended that our proposed act does not comply with the rule laid down by the Supreme Court of the United States but is directly hostile to it. The clause which is found to be objectionable is found on page 4 of the bill, lines 13 to 19, and provides as follows:

"The Regents may in their discretion by majority vote revoke such approval of any such film or reel at any time. Such revocation shall be complete upon personal service of notice of such application upon the proprietor of such film or reel or upon any agent of such proprietor having charge of the lease, sale or exhibition of any such film or reel."

The principle laid down by the United State Supreme Court which is said to be violated by this bill is expressed by the Court as follows:

"Undoubtedly the Legislature must declare the policy of the law and fix the legal principles which are to control in given cases, but an administrative body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply."

It may be noted here that this is the principle which has been made applicable in this State by the Court of Appeals in two re-

cent decisions. (*Village of Saratoga Springs v. Saratoga Gas, etc., Co.*, 191 N. Y. 123; *People v. Klinck Packing Co.*, 214 id. 121.)

Judge Cullen contends that the portion of the bill which sets a standard for the Board of Censors, namely, that the board may find such pictures to be "moral and proper" and may disapprove of those it finds to be "sacrilegious, obscene, indecent or immoral or tending to debase or corrupt the morals," complies with the rules laid down by the Supreme Court, and that if the fate of a proposed exhibition of moving pictures ended with the decision of the Board of Censors, the validity of the statute probably could not be challenged. But, it is contended, the bill goes further and prescribes that "the Regents may in their discretion by majority vote revoke such approval of any such film or reel at any time." The criticism is that the determination of the censors is to be governed by a rule fixed by the Legislature, while that of the Regents is to be governed by its discretion.

If it was the intention of the Legislature to leave the determination of the Regents to the discretion of that body and not limited it to the rule prescribed for the Board of Censors, the contention of Judge Cullen is unquestionably sound. If, on the other hand, the discretion of the Regents was intended to be the judgment of the Regents based upon the rule laid down for the Board of Censors, the contention is not sound. But it does not seem to me to be necessary for the Governor to determine that question if it is his judgment that the bill is valid and justifiable legislation in other respects. I believe there is a very great likelihood that the Courts would hold that the provision which is questioned is severable from the rest of the act and that the balance of the provisions are sufficient to be operative and accomplish their proper purpose. It is a fundamental principle that a statute may be constitutional in one part and unconstitutional in another part, and that if the invalid part is severable from the rest the portion which is constitutional may stand while that which is unconstitutional is stricken out and rejected. (*Lawton v. Steele*, 119 N. Y. 226; *Hathorn v. Natural Carbonic Gas Co.*, 194 id. 326.) The constitutional and unconstitutional provisions of the statute may be included in one and the same section, yet be severable so that some stand while others fall. (*Loeb v. Columbia Twp. Trustees*, 179 U. S. 472.)

In view of the established custom of judicial tribunals of avoiding the determination of questions as to the constitutionality of a statute except when necessary in deciding litigated cases, the Courts will decline as a rule to decide whether a particular provision of a statute is unconstitutional where they are of the opinion that if such provision is in fact invalid it may be severable from the remaining provisions of the statute, the validity of which alone is necessarily before the court. (*Fort Smith v. Scruggs*, 70 Ark. 549; 91 Am. St. Rep. 100.)

If sufficient remains to effect the object of the statute without the aid of the invalid portion, the latter only should be rejected. (*State v. Santee*, 111 Iowa, 1; 82 Am. St. Rep. 489; *Pugh v. Pugh*, 25 S. Dak. 7; 32 L. R. A. [N. S.] 954.) The portion which remains should express the legislative will independently of the void part. (*Ballentine v. Willey*, 3 Idaho, 496; 95 Am. St. Rep. 17; *State v. Junkin*, 85 Neb. 1; 23 L. R. A. [N. S.] 839.)

One of the tests used to determine whether a provision is or is not severable is that the statute ought not to be held wholly void unless the invalid portion is so important to the general plan and operation of the law in its entirety as reasonably to lead to the conclusion that it would not have been adopted if the Legislature had observed the invalidity of the part so held to be unconstitutional. (*Ex parte Gerino*, 143 Cal. 412; 66 L. R. A. 249; *State v. Deal*, 24 Fla. 293; 12 Am. St. Rep. 204.)

Another test is that non-essential portions may be eliminated and effect given to the remained, and incidental details may be stricken out without impairing the general scheme of the enactment. (*McPherson v. Secretary of State*, 92 Mich. 377; 31 Am. St. Rep. 587; *People's Nat. Bank of Lynchburg v. Marye*, 191 U. S. 272.)

Applying these principles which seem to be well settled to this bill, it is my judgment that the Courts would find that the provision with reference to the power of the Regents to revoke an approval is severable from the rest of the statute. It is not so interblended as to require the entire statute to fall if it should be found to be unconstitutional in respect to that provision. I am led to this conclusion by what seems to me the apparent intent of the provision, namely, that there shall be a still further refine-

ment of a censorship by the Regents in addition to the censorship of the board, and not as a review thereof. If it is intended to be a review by the Regents in all cases, I would incline to the opinion that the power of review carried with it the limitation of power defined by the statute with relation to the Board of Censors. If that be true, the provision itself is not unconstitutional. But it appears more clearly to be an additional censorship rather than a review, and in that respect it stands separate and apart from the rest of the statute. It, therefore, does not seem so important to the general plan and operation of the law in its entirety as reasonably to lead to the conclusion that the statute would not have been passed without it.

Judge Cullen criticises the fact that no review by the Courts of the decision of the Board of Censors is granted in the proposed statute. It is not necessary that such a review shall be expressly granted in the statute, since it has been well established in this State that a common-law writ of certiorari may be issued to review the judicial determinations of inferior tribunals and officers acting judicially under the authority of the statute, to correct errors of law affecting the property or rights of the parties, even though no right to review is expressly conferred by the statute. And it is equally clear that if the duty enjoined upon the Board of Censors calls upon them to decide some question of fact every time there is an application made to them for the issuing of an approval of a film, then in the making of that decision they act judicially notwithstanding there may be closely interwoven with it certain administrative or ministerial functions that must also be exercised. (*People ex rel. Loughran v. Railroad Commissioners*, 158 N. Y. 421, 428; *People ex rel. Steward v. Railroad Commissioners*, 160 N. Y. 202, 206; *Starr v. Trustees of Rochester*, 6 Wend. 564; *People ex rel. Burnham v. Jones*, 112 N. Y. 597, 607.)

This common-law right is now continued by the Code of Civil Procedure, sections 2120-2140.

Judge Cullen in his supplemental brief himself reaches the conclusion that the act of the board is not ministerial but judicial. The decisions of the board are therefore reviewable in the Courts by certiorari.

The other objections raised by Judge Cullen run to the same clause conferring upon the Regents discretionary power to revoke an approval. These objections criticise that same clause from various standpoints upon the theory that the clause confers arbitrary powers, denies the right of hearing and is otherwise vicious. If the clause be given the interpretation, however, that the term "discretion" is intended to keep the judgment of the Regents within the limitations prescribed for the board, the objections are not well founded. But even if that cannot be successfully contended, the clause as I have concluded, is severable from the balance of the statute.

Contention was made at the hearing that a copy of the film must accompany the report to the Regents and that there was no provision made for the return thereof to its owner. My reading of the statute leads me to believe that this would be the necessary interpretation of the statute. If the acts of the Board of Censors are to be reviewable by certiorari, the exact film which was approved or disapproved by the censors must be made a part of the record at least, for review in the Courts. It is therefore highly proper that a copy or duplicate of the film shall be kept on file for that purpose and also for the practical purpose of being able to determine whether the films that are being exhibited are an exact counterpart of the films which have been approved by the Board of Censors. It therefore seems to be a necessary expense in connection with this scheme of censorship.

The only other objection which has been called to my attention from the standpoint of the constitutionality of this bill is that the provision on page 9 of the bill violates the Fourteenth Amendment of the Federal Constitution in that it denies the equal protection of the laws. This provision reads as follows: "Provided, however, that no fee shall be required for such examination nor for the duplicate or duplicates of any film to be used in any miniature motion picture machine for education, social or church purposes where the film is of a size and perforation differing from the standard as used in theatrical machines."

The leading decision of the United State Supreme Court which is relied upon as authority for holding that this provision denies the equal protection of the laws is the case of *Cotting v. Kansas*

City Stock Yards Company, 183 U. S. 79. In that case a statute of Kansas was held to be in violation of the Fourteenth Amendment of the Federal Constitution in that it applied only to the Kansas City Stock Yards Company and not to other companies or corporations engaged in like business in Kansas, and thereby denied to that company the equal protection of the laws. That statute provided that its provisions should relate to any stock yard which for the preceding twelve months "shall have had an average daily receipts of not less than 100 head of cattle or 300 head of hogs or 300 head of sheep." In that statute the classification was entirely arbitrary since it was manifestly aimed at one particular corporation and the attempt was made to base the classification upon mere extent of business, and between the classification and such feature there was no legitimate connection whatever as was said by the Court of Appeals in *People v. Klinck Packing Company*, 214 N. Y. 138. As the Court stated in the latter case, in which it was considering the exceptions to application of the one-day-of-rest-in-seven law:

"In determining whether it will enact such legislation as this, the Legislature must necessarily always consider the two elements of necessity for the legislation and of the burdens which this enactment will inflict upon those who are subject to it. * * * So long as there is some real difference in the situation, interests and capacity of different classes of citizens, this may be made the basis of legislative classification which has a real and reasonable relationship to the difference which thus exists. The wide discretion possessed by the State is not transgressed unless the classification is palpably arbitrary.

The classification does not seem to be "palpably arbitrary" in the bill in question, for while it mentions the size of the film as one of the bases for the exemption, it is not the sole basis of the classification, but is merely descriptive of a class of films which it is my understanding is manufactured by all of the manufacturers for miniature motion picture machines. The door certainly is open to all to compete in the manufacture of such films for such purposes. Moreover, the size of the film has a relation to the exemption from the payment of the fee, because it is a well recognized

fact that these miniature motion picture machines are used for educational, social and church purposes and the machines and the films have been made of a distinctive size and type for various excellent reasons. The smaller machines are less expensive and more adaptable to smaller places. The smaller machines necessarily take a smaller size of film. It is important likewise to have these films of a different size because we have recognized in our statutes already passed this year (chapters 184, 185) that these miniature motion picture machines are susceptible of separate classification for various other purposes. They are less dangerous to the public because they use different power for operation and because the films are made of less inflammable material. It is proper that they should be of different sizes in order that they may not be readily mingled.

It is to be noted that the censorship is not withheld from films used for these machines and for these purposes, but that the sole exemptions is as to the payment of the fee. It requires no authority to point out the fact that in this State as in all other States it has been customary to grant exemptions from the payment of taxes where property is used for educational, social or religious purposes.

The United States Supreme Court had said within the last few weeks that "a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed." It was in the case of *Rast v. Van Deman & Lewis*, 240 U. S. 342, where a suit was brought to restrain the enforcement of a statute of Florida imposing special license taxes on merchants using profit sharing coupons and trading stamps. The Supreme Court held that a classification based on differences between a business using, and one not using, such coupons and stamps is not so arbitrary as to deny equal protection of the law.

It would not be my judgment that the clause on page 9 of the bill could be held unconstitutional as denying the equal protection of the law.

Dated, May 15, 1916.

HAROLD J. HINMAN,

Deputy Attorney-General.

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IN THE MATTER OF CONSTRUING SECTIONS 4, 5, 11 AND 12 OF ARTICLE VII OF THE CONSTITUTION, RELATIVE TO THE REQUIREMENT OF ANNUAL CONTRIBUTIONS TO THE SINKING FUNDS PROVIDED FOR THE STATE DEBTS.

Sinking funds must be separately considered and treated — duties of the comptroller as to the levy of a direct tax.

Constitution — Article VII — Sections 4, 5, 11 and 12 — Requirement of annual contributions to the sinking funds provided for the State debts.

The Constitution (Art. VII, sections 4, 5, 11) authorizes the passage of statutes creating State debts subject to the approval of the people, and provides that there shall be an annual contribution, either by direct tax or by appropriation from surplus funds in the treasury, to pay, and sufficient to pay, the interest on each debt as such interest falls due, and also to pay and discharge the principal of the debt within fifty years from the time of contracting it; that the law creating the debt shall require this annual contribution, and impose a direct tax therefor, the levy of which can be obviated only by the appropriation of the required amount from the treasury in lieu of a direct tax; that so far as debts are concerned which have been contracted under any such statute, the tax or its substitute "shall remain in force and be irrepealable and be annually collected" until the proceeds thereof shall have made provision to pay and discharge the principal of the debt; and that each of the sinking funds provided for the payment of interest and the extinguishment of such debts shall be separately kept and applied to the specific purpose for which it was provided.

There are a number of canal debt sinking funds as well as a number of highway debt sinking funds, together with the Palisades Interstate Park debt sinking fund, each of which is devoted to the payment of a separate debt with bonds separately issued therefor. Each of the statutes authorizing such debts complies with the constitutional requirement by imposing for each year after the act goes into effect, a direct annual tax, and prescribes the precise rate of tax. Several highway debt sinking funds are devoted to the payment of highway debts authorized by article VII, section 12, of the Constitution, which specifically requires the creation of a sinking fund of at least two per centum per annum, to discharge the principal at maturity, which shall be provided by general laws, the force and effect of which shall not be diminished during the existence of the debt created thereunder. The general laws passed pursuant to such section likewise impose "for each highway fund," an annual direct tax for these sinking fund purposes.

Held, that these sinking funds must be separately considered and treated, and that if the annual contributions to any uncompleted sinking funds for the ensuing fiscal year shall not be provided by appropriation out of surplus funds in the treasury, it would become the duty of the Comptroller to comply with the provisions of such statutes creating such debts, and to levy a direct tax pursuant thereto, to pay and sufficient to pay, such contributions.

Hon. Charles S. Whitman, Governor, submitted an inquiry as to the views of the Attorney-General with reference to vetoing the items in the appropriation bill providing the annual contributions to the sinking funds of the State which have been created for the purpose of paying the State's debts.

Pursuant to section 4 of article VII of the Constitution, the people of this State by their direct vote approved of chapter 147

of the Laws of 1903 which provided for the building of the Barge canal and for the creation of a debt therefore of \$101,000,000. Bonds for \$2,000,000 were issued under this act. There is now in the treasury a sinking fund in cash and investments of \$2,057,418.56 with which to retire this debt. It is known as canal fund number 2. Thus there is in that fund to-day more than the amount of the debt. No further contributions are needed for this fund and none have been made for this year.

Another and separate issue of bonds was made under this act, as amended by chapter 302 of the Laws of 1906 and chapter 241 of the Laws of 1909, amounting to \$21,000,000, and there is in the treasury a sinking fund of \$16,657,523.54 with which to pay them. This is known as canal fund number 3. This amount so nearly approximates the amount of the debt that, with the interest arising from the investment of the funds, compounded annually, the full amount required to pay the debt would be obtained long before the maturity of the bonds, without further annual contributions. Moreover, so much will be raised by the simple accretions of interest on the present fund that there will be an excess sufficient to pay the annual interest in addition for years to come. It was for that reason that at a conference held in 1914, attended by the representatives of the State and the chief investors in and holders of the State's bonds, it was mutually agreed that the State's credit would not be impaired by a treatment of this fund as mature and adequate for the retirement of the debt without further contributions for principal and permitting a portion of the interest on the investment in the fund to be used for the present, at least, to pay the annual interest charges on the bonds representing that particular debt.

It is not my purpose to justify even the action taken as to that particular debt, safe and justifiable as it may seem, because it has already been used as a precedent upon which the present Governor is requested to predicate a wholesale application of the policy to all the other sinking funds in which upon a so-called scientific and actuarial basis, there is said to be an excess beyond present financial requirements. I say "financial requirements" because substantially all, if not all, of this so-called excess has been contributed to these funds under the *legal requirements* of the Constitution

and the statutes creating the debts. I have referred to the action taken as to that one fund to distinguish it from the balance of the funds, the condition of which is entirely different.

There are nine other canal debt sinking funds, six highway debt sinking funds and the Palisades Interstate Park debt sinking fund. Each of these sinking funds is devoted to the payment of a separate debt, separately authorized, with bonds separately issued therefor, and the sinking fund in each case separately created by law.

Each of these funds must be separately considered and treated because the Constitution (article VII, section 5) clearly requires it in the following language:

“The sinking funds provided for the payment of interest and the extinguishment of the principal of the debts of the State shall be *separately kept* and safely invested, and *neither of them shall be appropriated or used in any manner other than for the specific purpose for which it shall have been provided.*”

This was inserted in the Constitution in 1874 upon the recommendation of the Constitutional Commission of 1872, which reported that it was intended to “maintain the inviolability of the sinking funds” and “that it was so obviously just that it needs only to be read in order to be approved.” This provision was continued without change in the Constitution of 1894 and is applicable to the sinking funds of to-day.

It is, therefore, perfectly clear that the inviolability of each of these sinking funds must be maintained without reliance upon any other sinking fund or all of the other sinking funds put together. They must be “separately kept” and “neither of them shall be appropriated or used in any manner other than for the *specific purpose* for which it shall have been appropriated.” Those funds cannot be intermingled directly or indirectly. The excesses in one cannot be used to make up a deficit in another. Yet that is the very thing that would have to be done if the Governor complies with the request to veto all the items appropriating moneys to meet the annual contributions to the sinking funds for principal and interest. For example, there is an aggregate so-called excess in the eleven canal debt sinking funds of about \$22,000,000, but

there are only five out of the eleven funds which have even the theoretical excess which has been calculated by the objectors. If the Governor shall veto the whole eleven, a deficit will be created in six of them. I can only account for the request for a wholesale veto upon the assumption that the proposers contemplate a pooling of all the excesses and using that aggregate fund to pay the annual interest charges on all the bonds of all the debts. It is too manifest without further argument that that cannot be done. It would not be using a specific fund "for the specific purpose for which it was provided" and the procedure of the Constitution to that effect and to the effect that each fund be "separately kept" would become an empty ceremony. The misconception of those who would utilize these so-called excesses is their lack of appreciation of this constitutional requirement and their failure to note the fact that of the \$22,000,000 aggregate excess in the eleven canal funds, \$15,000,000 of it is in canal fund No. 3 to which I have specifically referred and as to which no contribution is made this year by the Legislature. One other large excess of about \$1,000,000 is in canal fund No. 2, to which I have also referred, which is now sufficient to pay that debt in full and likewise for which no contribution is made this year.

Upon considering the comptroller's reports to me on this subject in connection with the canal funds for which contributions have been provided by the Legislature and which the Governor is being asked to veto, I find that only two canal funds out of the nine show even any theoretical excess of any consequence, and even in those cases the amount in the fund is only a small percentage of the amount of outstanding bonds. In neither of these cases is there anything like the situation which exists in canal funds Nos. 2 and 3, in one of which the debt is more than covered and in the other of which the full amount has almost been reached.

It is, therefore, apparent that the considerable increase beyond theoretical needs in two funds, which have been separately cared for, is made the basis for figuring that all the other funds should be similarly treated, whereas there is no such extraordinary condition to be found in the other funds. The former two will retire their debts without further contributions, while the others require substantial contributions each year to retire their debts, yet the

Governor is asked to provide nothing this year. There is no parallel between them, and since the Constitution and the statutes require an annual contribution at a fixed rate, there is no warrant for vetoing these items either in law, equity or morals, as I shall endeavor to show.

A similar situation exists as to the highway debt sinking funds and the Palisades Park fund, in three of which there would be a deficit if the Governor should veto these items, and in none of these funds is there a parallel to canal funds Nos. 2 and 3. Out of a total issue of \$72,500,000 of outstanding bonds for highways and for this park, the theoretical excess in all but two cases is considerably less than \$1,000,000 each, and in all cases contributions are required each year at a fixed rate if the constitutional requirements are to be observed, yet the Governor is asked to provide nothing, not even that amount which, if annually provided on a scientific basis of amortization, would retire the debt at maturity.

If it be said that it is intended to figure the necessary contributions to these funds over again from the outset of their establishment, allowing for each year only such amount as was theoretically needed, irrespective of the legal requirements and to treat the contributions of this year for principal as having been paid in advance, my answer is that the law would be violated and that in addition the interest will be left unpaid unless some of these funds shall be seized for that purpose. The interest on these bonds in previous years has been raised and paid and the moneys and securities now in these funds are devoted to the payment of the principal of the debts. The Constitution requires them to be kept inviolate for that purpose, and they cannot be seized for the payment of this year's interest or any subsequent year's interest until the sinking fund shall be completed. In this respect even the treatment of canal fund No. 3, which is almost completed, is not in strict compliance with the letter of the Constitution. The only redeeming feature of that case is the substantial completeness of the fund and the fact that such treatment was prescribed as the result of a conference and agreement with the chief holders of the bonds. The result of that departure from the strict letter of the constitutional requirement is the result which always obtains in human experience. Violation of the law in inconsequential

matters, if persisted in, inevitably leads to a loss of sense of the existence of or respect for the law itself.

Moreover, if it be contended that I am wrong in that respect, and that the moneys may be used for this year's interest and if the veto of the appropriations for both principal and interest would create deficits in many of these funds and for that reason the Governor should veto only the interest items, I am compelled to call attention to the impossibility of his separately considering them. There is no separate appropriation for interest or principal, but they are both included in one appropriation, the amount of which in the case of each fund is determined by reference to the rate of tax. The amounts of money set up in the appropriation bill in this connection are merely explanatory of the effect of the rates. They are estimates of the amounts that will be applied from the treasury to both principal and interest in conformity with the requirements of the Constitution and the referendum acts creating the debts. Since the Governor cannot divide or modify an item, but must consider each item as a whole, he cannot veto the appropriation for interest without vetoing for principal also, and the effect of that action would be to create a deficit in a majority of the cases even if we figure the financial requirements in accordance with the method urged by the objectors.

This leads me to a consideration of the constitutional requirements themselves as to the creation of a debt and the fixing of the method of taxing the public for the payment of that debt. The canal debts were created under section 4, article VII of the Constitution by various referendum laws. The Constitution provides that "such law shall impose and provide for the collection of a direct *annual* tax to pay, and sufficient to pay, the interest on such debt as it falls due, and also to pay and discharge the principal of such debt *within* fifty years from the time of the contracting thereof." The only alternative open to the Legislature is to obviate a direct tax by making the necessary contributions out of the treasury of the State or by repealing the act, but even if the act creating the debt should be repealed, it could be repealed only to the extent of forbidding the contracting of further debt under it; for if any portion of the debt shall have been contracted, the Constitution prescribes that "the tax imposed by such act, in proportion to the

debt and liability which may have been contracted in pursuance of such law, shall remain in force and be *irrepealable*, and be *annually collected*, until the proceeds thereof shall have made the provision hereinbefore specified to pay and discharge the principal of such debt and liability." The plain requirement of the Constitution, deliberately enacted for the security of the State as well as of investors, is that there shall be an annual contribution; that the law creating the debt shall require this annual contribution and impose a tax therefor and that so far as debts have been contracted thereunder such law shall remain in force and be irrepealable.

But while such law is required to and actually does impose a tax which shall be annually levied for that purpose, the Legislature is given the opportunity if the surplus funds in the treasury warrant it, to change the method of raising the money from a direct tax to a contribution from the treasury. Article VII, section 11, of the Constitution, which authorizes this provides as follows:

"The Legislature may appropriate out of any funds in the treasury, moneys to pay the accruing interest and principal of any debt heretofore or hereafter created, or any part thereof and may set apart in each fiscal year, moneys in the State treasury as a sinking fund to pay the interest as it falls due and to pay and discharge the principal of any debt heretofore or hereafter created under section four of article seven of the Constitution until the same shall be wholly paid, and the principal and income of such sinking fund shall be applied to the purpose for which such sinking fund is created and to no other purpose whatever, and, in the event such moneys set apart in any fiscal year be sufficient to provide such sinking fund, a direct annual tax for such year need not be imposed and collected, as required by the provisions of said section four of article seven, or of any law enacted in pursuance thereof."

This was adopted by vote of the people in 1905 for the purpose of obviating a direct tax. It was an alternative remedy and unless the Legislature shall make the necessary contributions from the treasury pursuant to this section, a direct tax must be levied. Moreover, it does not require the action of the Legislature this year to levy such direct tax for this year, because each of these

referendum acts by its specific terms provides that there is imposed for each year after the act goes into effect a direct annual tax sufficient to pay the interest on such bonds and also to pay and discharge the principal of such bonds within fifty years, and prescribing the precise rate of tax upon each dollar of valuation of real and personal property in the State subject to taxation. Thus, if the Governor should veto these items of appropriation from the treasury for this purpose, it would become the duty of the Comptroller to comply with the provisions of these referendum acts and to levy a direct tax pursuant thereto, and he could be compelled to do so. It may be that if the subject could now be taken up anew a small tax would be levied, adequate to provide a sinking fund for the payment of these bonds at the end of fifty years, but since the Constitution requires that such funds must be created under referendum acts providing for an irrepealable annual tax imposed when the debt is created as a condition of creating it, after bonds are issued under such an act, the Legislature cannot act again. The method adopted in the referendum act by the people for taxing themselves to meet the debt created and the interest thereon, is one of the basic provisions of the act which, as I have contended in previous opinions, cannot be changed. It is not left to the discretion of subsequent Legislatures to meddle with the tax until the sinking fund shall equal the debt. What the Legislature itself cannot do by statute, the Governor is asked to do by main strength in violation of the statute and of the Constitution.

While the second \$50,000,000 of highway debts are being contracted pursuant to a referendum act similar to the referendum acts creating the canal debts and are subject to the same constitutional requirements which I have mentioned, it is to be noted that the first \$50,000,000 highway debt was created under the special provisions of section 12 of article VII of the Constitution, which provides as follows:

“The payment of the annual interest on such debt and the creation of a sinking fund of at least two per centum per annum to discharge the principal at maturity shall be pro-

vided by general laws whose force and effect shall not be diminished during the existence of any debt created thereunder."

This provision by its liberal requirements will likewise create a sinking fund which will equal the debt a number of years before the debt matures, but its plain and unmistakable terms are that a two per cent contribution which shall be made annually to these funds shall be provided by general laws whose force and effect "shall not be diminished during the existence of any debt created thereunder."

Chapter 469 of the Laws of 1906 and acts amendatory thereof, which created these highway debts and provided for the highway sinking funds, authorized pursuant to section 12 of article VII of the Constitution, likewise imposed "for each year hereafter" an annual direct tax at a certain rate, just as had been provided by the canal referendum acts, and the Constitution clearly prescribes that the force and effect of these statutes cannot be diminished during the existence of any of these debts. If no contribution is made to these sinking funds out of surplus in the treasury, the Comptroller is not only authorized but required to levy the necessary direct tax to make such contribution.

The theory of those who object to a compliance with these irrepealable statutes is that too great a burden is cast upon the present generation and that there should be established a rule of equality between the present and the future. It involves the absurdity that the extreme limit of fifty years "*within*" which the debt must be paid amounted to a command that it should not be paid at an earlier date and that the debt created, as, for example, a highway debt, is provided for a public improvement permanent in its nature and not requiring constant renewal from use, or, in the case of the canal, a change of policy due to a change of condition. Certainly there is nothing in the experience of the State thus far to warrant us in believing that the life of any of our improved highways will in any way approximate the life of the bonds issued for their improvement, or for even half of that time. Unless future generations shall raise the money to renew the roads already built, these roads will have been utterly destroyed before the last highway

bonds shall be paid. The requirements for contributions to these funds should be determined by the benefits accruing from the expenditures. It is only thus that we maintain a rule of equality between the present and the future: The State's good fortune in providing for the payment of its debts prior to the expiration of the fifty year period furnishes no warrant in morals or in equity for the seizure directly or indirectly of any part of the sinking funds for the uses of the present administration.

There have been eras in this country of wild-cat credit, of speculation and of faith in the outcome of things, even of repudiation of State debts and of the postponement of obligations. The establishment of one bad precedent has often led to a prodigality of abuses at such a time, somewhat proportionate to the ease with which the precedent was established. We have passed through periods of financial crisis when the government and the governed were impoverished, and if that time shall come again during the lifetime of these bonds, it will be a source of strength to this State which may stand between it and bankruptcy to be able to point to sinking funds to meet its debts, which have not been accumulated in accordance with the scanty measurement of the actuary, but fully matured, even to an excess over ordinary requirements. There may have been mistakes of constitutional or legislative requirements which have led to this so-called excess, but, if so, I choose to treat it as a providential error.

There have been times in this State when, to escape taxation, interest payments on our early canal debts were provided for by additional loans and the payment of the debt itself was deferred. Between 1817 and 1826 New York, in that internal improvement period, set aside a definite revenue for the payment of interest and redemption of debts, but in 1826 a glorious epoch of freedom from direct taxation set in which exhausted the treasury and almost ruined the credit of the State, leading to the Constitutional Convention of 1846. The basis of the evil in the use of the public credit at that time was the refusal to be taxed to pay the State's debts; and the constitutional provision of 1846 not only provided for restraint in the *creation* of public debt, but made specific provision for the *method of payment* of debts, founded upon that experience of the past. The reluctance to be taxed and the tempta-

tion to defer payment is evidenced to-day just as it was in the years 1826 to 1846. The pinch of taxation for excessive public improvement and the unwillingness to submit to direct taxation which existed then is being felt again, particularly in the city of New York. History is simply repeating itself, and profiting by the experience of the past and abiding by the clear mandates of the Constitution, there is but one course for the State to pursue. A direct tax must be levied or a contribution must be made from the surplus funds in the treasury. If the Constitution shall be amended to provide a different arrangement for the future, then will be time enough to adopt any other course. Until that time at least, the present sinking funds must be, and I trust even then will be maintained inviolate. As the chief magistrate of the State, sworn to execute the law, I feel that you should not be persuaded to acquiesce in what I regard as a most serious violation of the law.

The real cause of abuses in the use of credit is not so much in borrowing or the amount borrowed, but in a deferment of payment. Just as soon as this State, which has an authorized indebtedness of \$231,000,000, starts to show a disposition to defer payment, the credit of the State will be ruined or the reckless creation of further debts will begin. Shifting the tax burden into the future will be increasingly tempting as we find new uses for public money and as we find a limit to the sources of indirect revenues, accompanied by the usual aversion to direct taxation.

No one can foretell whether or not the time shall come when the whole temper of the time will again foster a reliance on the future to finance the government and engender a willingness to enter upon the most daring financial projects. It may well be thought that the time is near at hand, when we receive suggestions to use funds for present purposes which have been devoted to future purposes and which should be maintained inviolate. It shall never be said that I advised a precedent which in the future may lead some Governor and those in authority with him to venture to the limit of reckless finance, either in the creation of debt or the violation of the legal and moral requirement to live up to the limit of the State's obligations upon existing debts.

We have witnessed the financial embarrassment of New York city due to reckless financing, and an attempt has been made

to establish a pay-as-you-go policy for that city. Strangely enough, we find paralleling this attempt a demand upon the State that it shall defer to the future as much as possible the payment of the debts of the State. The wisdom of the one is made to appear to be the folly of the other. The strength of this administration's treatment of the whole situation should lie in its consistent effort to assist New York city and at the same time to preserve the faith and credit of the State. The best lesson that can come to New York city for its own future welfare is the pinch of the necessity to meet its own obligations, recklessly made, without being permitted to ask that the State commit itself to a ruinous policy as a method of relief to that city.

Even if a direct tax were to be levied each year for these contributions for principal and interest for these sinking funds, the total tax on each dollar of real and personal property in this State subject to taxation would be less than one dollar on each thousand dollars of valuation. What man is there in this State who owns his little home or farm worth \$5,000 or less, who cannot afford to spend not more than five dollars a year to maintain the credit and safety and the honor of the State in its financial transactions?

I cannot conclude without calling your attention to the attitude of the recent Constitutional Convention upon this subject. In spite of the most persistent demands for the use of these so-called excesses for the payment of the interest on these bonds, the finance committee of the convention, Republicans and Democrats alike, with the exception of Senator Wagner, refused to consider any such course. The most that this committee, the action of which met with the unqualified approval of the convention, recommended was as expressed by Mr. Stimson, the chairman of that committee, that "we would start with the proposition that those funds there should remain inviolate and should be continued on a proper basis of amortization." On this committee in addition to Mr. Stimson there were a number of well-known, able and highminded citizens of the city of New York, all of whom, with the exception of Senator Wagner, united in the report of the committee. As Mr. Stimson stated to the convention, "the State of New York has bragged" about the fact that we have these large reserves in these sinking funds, and the reports of the various comptrollers, together with

their advertisements for the sale of issues of bonds, have called attention to the condition of these funds, showing that the sinking funds contained substantially \$40,000,000. In this connection it was pointed out to the convention that if substantially \$6,000,000 is to be taken out of these funds each year for the payment of interest, in a few years, if that process goes on, the sinking funds would be reduced from \$40,000,000 to perhaps \$15,000,000 or \$16,000,000. The best financial judgment as to the effect of such a reduction of the funds, after we had boasted about the extent of them, was that it would be hazardous, if not ruinous, to the credit of the State. That is the reason why the New York city members of that committee and of the convention voted in favor of retaining these funds now accumulated, inviolate.

To use these sinking funds for the payment of this interest would not be in the interest of the taxpayers as indicated by the mayor of the city of New York, for every dollar will have to be raised over again and paid into these sinking funds; and a forced sale of the securities in which these sinking funds have been invested in order to pay this interest might mean, indeed would be likely to mean, a disastrous loss to the State. The taxpayers of the city of New York should not be permitted to be blinded to the wasteful and extravagant budget of that city by any such effort as has been made to charge the extent of that budget in any material way to the payment of State taxes. Even if a State tax were being levied this year to the extent to which it was levied last year, it would amount to only a small fraction of the budget of the city of New York. But as a matter of fact, no direct tax is levied this year, and no part of the budget of the city of New York is chargeable to the payment of these contributions.

The adoption by you of the plan that has been urged upon you so vigorously could, and, in my opinion, would have another very serious result. Any action by the State which may tend to impair in any degree the security which the State has offered for the payment of the State's indebtedness, will, necessarily, result in the impairment of the attractiveness of the bonds of the State for investment purposes. The bonds of the State at the present time are most highly regarded by conservative investors.

Impairment of their attractiveness, accomplished in any manner, must of necessity be compensated in some way. If the sinking

fund for the redemption of such bonds shall be diverted or weakened, it is more than likely that the State will be compelled to pay a higher rate of interest than has heretofore prevailed.

Instead, therefore, of saving money, the State may find itself hereafter burdened with a debt bearing a higher rate of interest than has heretofore been necessary, and the tax budget of the future administrations materially increased and the taxpayers of the State more heavily burdened with interest charges than heretofore, and heavier than would be necessary if the conservative policy heretofore followed be continued.

For all these reasons I cannot advise you to comply with the request of those who would have you veto these items making contributions to the sinking funds, but on the contrary, I desire to urge you most strongly not to do so.

I am submitting herewith a report to the Comptroller setting forth the actual condition of each of the sinking funds giving the amounts of estimated excess where such exists, the estimated amounts of contribution to each of the funds for principal and interest provided in the appropriation bill and the balance of estimated excess or the deficit which will result if you should comply with the request to veto these items of appropriation.

Dated, May 19, 1916.

E. E. WOODBURY,

Attorney General.

* Opinion prepared by Hon. Harold J. Hinman, Deputy Attorney-General.

HIGHWAY LAW, SECTIONS 90 TO 101, 320, 320-a.

The moneys raised as provided by sections 90 to 101 of the Highway Law cannot be used either for construction or maintenance of highways constructed under the provisions of sections 320 and 320-a of the Highway Law.

INQUIRY

May a town expend any portion of the town highway fund (the fund provided by sections 90 to 101 inclusive of the Highway Law), in the construction or improvement of highways under the provisions of section 320 or 320-a of the Highway Law?

OPINION

Under section 3, chapter 30 of the Consolidated Laws of 1909, there were but three classifications of roads, viz.: State, county and town highways.

Chapter 564 of the Laws of 1910 provided for a "county road system of working the highways" in counties adjacent to cities of the first class, and by chapter 254 of the Laws of 1911, the provisions of the act were extended to apply to counties containing a city of the second class.

By chapter 567 of the Laws of 1910, an amendment was made to section 3 of the Highway Law providing for a fourth classification of highways and was numbered 3 in such classification and reads as follows:

"3. County roads are those designated as such under a general or special law and constructed, improved, maintained and repaired by the county as such in counties in which the county road system has been or may be adopted."

Chapters 564 and 567 of the Laws of 1910, above referred to, took effect upon the same date (June 21, 1910), and were apparently passed by the Legislature as concurrent measures, so we find that the roads classified as "county roads" are those which are constructed wholly at the expense of the county, and are wholly exempt from the jurisdiction of the highway officers of the towns and villages in which such roads are located.

Section 320 of the Consolidated Highway Laws, also provides for the construction of roads in such counties as the Boards of Supervisors thereof may decide to improve, at the joint expense of the county and the town or towns in which it is located and must be classified as "Town Highways" if at all. Such roads are constructed under the supervision of the County Superintendent and after they are completed they are maintained at the expense of the town or towns in which they are located, under the Board of Supervisors shall apportion a share of the expense of repair and maintenance upon the county. This section was quite materially amended by chapter 198 of the Laws of 1914, but the expense of constructing such roads is still left to be paid for at the joint expense of the county and towns, and the maintenance and

repairs of the same, after completion, is to be borne by the town or towns in which it is located unless the Board of Supervisors shall decide to have the county pay a part thereof.

Section 320-a (being chapter 61, Laws of 1914), provides a still different method for the construction of town roads at the joint expense of the county and town, but the construction is under the supervision of the town superintendent of highways, or some other person designated by the county superintendent, and after the completion thereof the cost of maintenance and repair is to be borne solely by the town or towns in which it is located, unless the Board of Supervisors shall apportion a share of the expense upon the county. Roads constructed under this section must also be classified as "town highways," if at all.

Both of these sections provide an independent method for the construction of such roads at the joint expense of the county and town or towns in which the same are located, and it is apparent that the Legislature intended that the expense of all such improvements should be borne by the localities which may decide to avail themselves of the provisions of such acts, in fact to provide for an entirely different system of improvement independent of and entirely separate from any other provision of the Highway Law, and when a locality has decided to adopt such a course the funds necessary to construct the same are to be wholly raised and provided as directed in and by such sections without regard to other highway moneys that are raised or apportioned to the county or towns as provided by the general provisions of the Highway Law.

It is provided in one sentence of section 320, as follows:

"The amount so paid by the town shall not be considered in determining the minimum amount to be levied and collected in each year for the repair and improvement of highways as provided in section ninety-four of this chapter, nor shall such amount be considered in determining the amount to be paid by the State to the town for repair and improvement of highways therein."

And again, the closing sentence of both sections reads as follows:

"Such highways, when completed and accepted by the Board of Supervisors, shall be thereafter repaired and main-

tained at the sole expense of the towns in which they are located, unless the Board of Supervisors shall apportion a share of the expense thereof upon the county."

It is clear from those two provisions that these roads cannot be classed as either "county highways" or "county roads" and it is equally clear that the moneys raised as provided by sections 90 to 101 inclusive, cannot be used for the maintenance of such roads. To hold that roads constructed under either section 320 or 320-a can be maintained by funds collected as provided by sections 90 to 101, inclusive, of the Highway Law, would be in direct conflict with the provisions of both sections 320 and 320-a as it is therein provided, that such roads shall be maintained solely by the towns unless the Board of Supervisors shall decide to have the county pay a portion.

I am, therefore, of the opinion that the roads provided for in sections 320 and 320-a were intended by the Legislature as a separate and independent system of road construction and maintenance and that the moneys raised as provided by sections 90 to 101 inclusive, of the Highway Law, cannot be used for the construction or maintenance of such roads.

Dated, May 23, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. EDWIN DUFFEY, *Commissioner of Highways, Albany, N. Y.*

PRISON LAW, SECTIONS 125, 134, 185, 187.

The money standing to the credit of inmates of the several prisons, reformatories and penitentiaries cannot be legally used for the purchase of goods for a so-called "convicts' store."

INQUIRY

Is it lawful and proper to purchase goods with convicts' money which has been deposited by the convicts in accordance with the provisions of sections 125 and 134 of the Prison Law?

OPINION

I am informed that for some time there has been conducted at Sing Sing prison a so-called "Convicts' Store" from which goods may be purchased at cost by the inmates of the prison, and that the stock of such store is purchased with money deposited by the convicts with the agent and warden of the prison.

The Prison Law anticipates two sources from which money may be deposited to the credit of convicts while working out their terms in the various prisons, reformatories and penitentiaries of the State.

1st. Such money as the convict may bring with him when he is committed to the prison and any other money which any other person may deposit for the prisoners' benefit as stated in section 134 of the Prison Law.

2d. Money earned by him while an inmate as provided in section 185 of the same law.

It is provided by section 134 that the money belonging to a prisoner under the first above classification shall be taken charge of by the agent or warden of the prison, and shall be returned to him upon his discharge unless it is otherwise legally demanded, with interest at the rate of four per cent per annum. It is apparent that such moneys cannot be used for the purpose of purchasing goods for a store, but are to be kept by the agent and warden and returned to the prisoner on his discharge or to some other person entitled to demand it.

Section 125 applies to both of the aforesaid classified funds and should be considered in connection with section 187 of the same law.

It is provided in section 125 in part as follows:

"The moneys so deposited by such agent and warden as convict deposits and miscellaneous earnings shall be subject to his check or draft only when countersigned by the comptroller. The comptroller shall countersign such checks or draft only when the same is drawn for the payment of an expenditure included in an estimate approved by the superintendent of state prisons, and for the purpose hereinafter stated. The agent and warden of each prison shall, on the

first day of each month, make an estimate and detailed statement of all moneys that will, in his judgment, be required for clothing, allowance and transportation of United States prisoners, and to repay to convicts moneys on deposit to their credit, and the interest thereon, as provided by section one hundred and thirty-four of this chapter, during such month, which estimate shall be forwarded to the superintendent of state prisons, who may revise the same by reducing the amount thereof, and he shall certify that he has carefully examined the same, and that the sums stated in said estimate are actually required for the purposes above stated, and he shall thereupon deliver the said estimate, so certified, to the comptroller."

It is thus made clear that no money standing to the credit of a prisoner can be withdrawn except upon checks countersigned by the Comptroller in payment of an estimate approved by the superintendent for the purposes hereinafter stated.

It is also provided by section 187 that any surplus standing to the credit of a convict on account of his earnings under section 185, may be drawn out by the prisoner during his confinement, "*only* upon the certified approved of the Superintendent of State Prisons for disbursement by the agent and warden of said prison or superintendent of said reformatory to aid dependent relatives of such prisoner, or for such other purposes as the Superintendent of State Prisons may approve; or may, with the approval of the said Superintendent of State Prisons, be so disbursed without the consent of such prisoner."

This section does not seem to contemplate the use of any of the moneys belonging to a convicvt for any purpose except such as will meet the approval of the Superintendent of Prisons. It follows therefore, that the Legislature intended to charge the superintendent, in every instance, with the responsibility of allowing a prisoner to withdraw any of his earnings while still in confinement, and it becomes the duty of the superintendent to inquire into the use which a prisoner intends to make, while still in prison, of any of his earnings, and if such use is deemed reasonable and proper by him, within the limits authorized by statute, it can be allowed, but in every instance it is addressed to the discretion and good judgment of such superintendent, and calls for the exercise of an

administrative duty which is imposed by the statute solely upon the superintendent.

I am informed that the store in question is supplied with certain goods which the convicts are allowed to purchase therefrom at cost, and thus save for themselves the profits which would otherwise accrue to some outside dealer if the same goods were purchased from him; and that the store is wholly within the prison grounds, and conducted under certain prison regulations and taken care of under prison authority, and the only legal question involved, is whether such use of the inmates' money is justified under the statute.

In so far as an inmate's money is invested in a supply of certain commodities which he may require for his own use, and which he is permitted to have and use from time to time upon the order of the agent and warden, and thus save himself the profits which some outside dealer would charge if such goods were purchased in the open market, I think the use of such prisoners' money for such purposes would be fairly within the provisions of the Prison Law, but I do not think that inmates' money can be legally used, for a general investment in a stock of goods which are to be sold indiscriminately to any inmate, either with or without the consent of the prisoners.

An estimate can be made for such commodities as are deemed necessary for a prisoner by the superintendent under section 125 of the Prison Law, and if approved by the superintendent the warden would have the authority to use so much of such convicts' money as would be necessary for the purchase of such goods, and while it is provided in section 187 that the earnings of a prisoner can be drawn out by him, as hereinbefore stated, "and for such other purposes as the Superintendent of State Prisons may approve, or may with the approval of the said Superintendent of State Prisons be so disbursed without the consent of such prisoner," there is nothing in the statute to indicate that the Legislature intended that such funds could be used for any purpose except for the personal benefit of each prisoner as his requirements may demand; certainly there is nothing in the statute which would indicate the right on the part of the warden to use such funds for the stocking of a store with goods for sale to any prisoner who may desire the

same, even with the consent of the prisoners whose money may be used for such purpose. A "Convicts' Store" may be convenient and of considerable benefit to the inmates of the prison, but I can find no authority under the statute which permits the use of the prisoners' funds for such purpose either with or without the consent of such prisoners.

I am therefore very clearly of the opinion that none of the moneys standing to the credit of a convict, which are specified in section 134 of the Prison Law, can be used for the purchase of goods for a "convicts' store" or otherwise; and that the moneys standing to his credit which were earned under the provisions of section 185 of the same law, cannot be used for the stocking of such a store, but may be used to purchase such supplies as the warden may estimate and the superintendent may approve for each individual prisoner from month to month.

Having reached this conclusion, it is perhaps unnecessary to add that it would be neither proper nor lawful for the agent and warden to make purchases from such supplies as have been purchased for the prisoners as above indicated, for use in the warden's kitchen, and to pay for the same out of the State funds.

Dated, May 25, 1916.

E. E. WOODBURY,

Attorney-General.

To Hon. EUGENE M. TRAVIS, *Comptroller, State of New York,*
Albany, N. Y.

MILITARY LAW, SECTION 245 — NATIONAL GUARD — STATE AND MUNICIPAL OFFICERS AND EMPLOYEES — SALARIES WHILE IN ACTIVE SERVICE.

Section 245 of the Military Law entitles State and municipal officers and employees to absent themselves from regular duty while on ordered service in the National Guard, whether they enlisted before or after the President ordered mobilization.

STATEMENT

Section 245 of the Military Law as added by chapter 103, Laws of 1911, provides:

“ § 245. MILITARY SERVICE, NOT TO AFFECT SALARY; VACATIONS, ETC. Every officer and employee of the State or of a municipal corporation thereof who is a member of the national guard or naval militia shall be entitled to absent himself from his duties or service while engaged in the performance of ordered military or naval duty under the provisions of this chapter, and while going to and returning from such duty. No such officer or employee shall be subjected by any person whatever directly or indirectly by reason of such absence to any loss or diminution of his salary or compensation or any loss or diminution of vacation or holiday privileges or be prejudiced by reason of such absence with reference to promotion or continuance in office or employment or to reappointment to office or to reemployment. The terms ‘officer’ and ‘employee’ as used in this section shall include every person by whatsoever title, description or designation known who received any pay, salary or compensation of any kind from the State or a municipal corporation thereof.”

INQUIRY

I have been asked whether this section covers military duty commanded by the President of the United States, or only intra-state duty such as strike or riot duty, and further, whether it covers the case of a man who enlists after the orders to mobilize have been given.

OPINION

There is no doubt in my mind that section 245 protects all State or municipal officers and employees when performing duty after being ordered out by the Governor at the direction of the President of the United States, as well as when ordered out by State authorities without call from the Federal government. The statute permits an officer or employee to absent himself “while engaged in the performance of military or naval duty under the provisions of this chapter, and while going to and returning from such duty.” The duty of serving under orders from the Federal government is a duty “under the provisions of this chapter,” for section 3 of the Military Law provides *inter alia* that:

"When the militia of this State or a part thereof is called forth under the Constitution and laws of the United States, the governor shall order out for service the active militia, or such part thereof as may be necessary."

A parallel may be found in the decision of the Court of Appeals in People ex rel. Gaston vs. Campbell, 40 N. Y. 133. Chapter 129 of the Laws of 1858, which constituted part of the Military Law of the State during the Civil War, provided:

"§ 17. No person belonging to the military forces shall be arrested on any civil process, while going to, remaining at, or returning from any place, at which he may be required to attend, for election of officers or other military duty."

The sheriff refused to execute a warrant against Gaston, who was an officer in the 14th Regiment, New York State Militia, which regiment had been mustered into the military service of the United States, and he was punished for contempt by the Supreme Court. On appeal the Court of Appeals reversed the Supreme Court and held that Gaston was not subject to arrest. It was argued that since he had been mustered into the service of the United States, he was no longer entitled to the exemption of the State statute in regard to the militia. The Court of Appeals held that the exempting statute, although it had reference to the State militia, did not limit its application to military duty to the State, and further held that the State militia owes a duty both to the State and National government; that while in the service of the National government they are still the militia of the State, and the fact that when employed in the service of the government of the United States they are necessarily placed under the army regulations of the United States, does not alter the case; they are still a definite military force belonging to the State. I believe that the question before me is parallel. Section 245 of the Military Law does not limit its application to military or naval duty in the service of the State, but covers military or naval duty "under the provisions of this chapter." And as pointed out above, this chapter does provide for service under the orders of the Federal government.

The question whether section 245 applies to men enlisting after the call or not, has given rise to the suggestions that the Legislature probably did not contemplate such enlistment; that it passed the section to encourage enlistment in times of peace, and not after orders for mobilization in times of crisis, and that to interpret it otherwise would be against public policy as discouraging others than those protected by the section, from enlisting, especially in times of stress. The statute, on its face, appears to cover not only the case of a State or municipal officer or employee who was a member of the National Guard at the time it was ordered out, but also the cases of those voluntarily enlisting thereafter, and even all those who might be drafted into the National Guard against their will, and ordered on duty. The statute extends its protection to "every officer and employee of the State or of a municipal corporation thereof, *who is a member of the National Guard or Naval Militia.*" "Who is," it is perfectly obvious, does not mean *who is at the time of the passage of this act*; the purpose of this statute being to encourage enlistments, not to protect certain men in office at a certain time, to the exclusion of those who might come later. If "who is" does not mean who is on May 6, 1911 (the day the act took effect), it must mean who is at the time, in the words of the statute, "entitled to absent himself from his duty or service while engaged in the performance of ordered military or naval duty * * * and while going to and returning from such duty." If a State or municipal officer or employee, not a member of the National Guard, joins a regiment of the National Guard after it has been ordered to mobilize, he then "is" a member of the National Guard and becomes entitled to absent himself from his duties or service to the State or municipality "while engaged in the performance of ordered military or naval * * * duty." There is nothing in the statute to signify any intention on the part of the Legislature to mean that the duty entitling one protected by the statute to absent himself, must have been ordered subsequent to his enlistment. The duty is "ordered" duty whether the orders were given to the regiment before or after the enlistment of the individual, though they had no application to the individual until after his enlistment. There is no basis for a suggestion that the Legislature did not contemplate

enlistments after orders for mobilization. There is nothing in the statute or elsewhere to show what the Legislature did or did not contemplate. All we can say is what they did enact. The same is true of the suggestion with regard to enlistments in times of peace as distinguished from those in times of stress. And as to public policy, who can say to what extent, if any, the benefit to State and municipal officers and employees would discourage enlistment by others? On the contrary may not the example set by the State with regard to its own employees and those of its municipalities be followed by numerous private employers, corporate and individual, with the result that enlistment by others will be greatly encouraged? There is no way of determining just what, and how much of it was in the minds of the Legislature when they enacted section 245, but we do know what a previous Legislature did when, in 1899, chapter 654 of the laws of that year was passed, providing in part:

“ § 1. All the employees of the State of a State department who enlisted as volunteers in the United States service during the war with Spain, who did not receive their pay as State employees during their absence from their places of employment, are hereby declared entitled to pay as public employees, from the time of their enlistment until their honorable discharge from the service of the United States.”

In the case the Legislature rewarded the State employees who had enlisted, regardless of whether they had been members of the National Guard before enlisting in the service of the United States, without respect to whether enlistment was before or after mobilization, and with their eyes wide open to the fact that the military service rendered was a service to the Federal government and not (directly) to the State.

CONCLUSION

I, therefore, conclude that section 245 of the Military Law has the effect of protecting State and municipal officers and employees engaged in military duty as a part of the National Guard (1)

although in the service of the United States, and (2) whether they enlisted before or after orders were issued for mobilization.

Dated, June 24, 1916.

E. E. WOODBURY,

Attorney-General.

To Hon. CHARLES S. WHITMAN, *Governor, Albany, N. Y.*

SECTION 4, TAX LAW, SUBDIVISION 5.

Real property purchased with pension money by the widow of a soldier or marine is exempt from taxation to the amount of the pension money invested therein not to exceed \$5,000.00 for all purposes except school and highway taxes.

INQUIRY

Is property purchased with pension money by a widow of a pensioner, received by her from the United States government, exempt from taxation, the same as if it were purchased by her husband with pension money received by him?

OPINION

It is provided by subdivision 5 of section 4 of the Tax Law that the real property purchased with the proceeds of a pension granted by the United State government for military or naval services, and owned by the pensioner, or by his wife or widow shall be exempt from taxation to the amount of the pension money used in the purchase thereof not to exceed \$5,000, if exemption is claimed and established as required by such subdivision, for all purposes, except that it shall be taxable for local school purposes and for the construction and maintenance of streets and highways.

Prior to the enactment of chapter 347 of the Laws of 1897, the above mentioned subdivision 5 contained only the first sentence of the present section, and before the amendment of 1897 the right to exemption was found in section 1393 of the Code of Civil Procedure.

This section of the code was before the Special Term in Monroe county in *People ex rel. Scott vs. Williams*, reported in 6 Misc. page 185, and Judge Bradley therein reached the conclusion that

the widows of pensioners were "entitled to the same beneficial enjoyment of their pension, and by the statute in question are given the same protection in respect to it, that their husbands, if living, would have had by way of exemption from process and taxation."

The same subject was indirectly involved in *Matter of Peck*, 80 Hun, 122, Third Department, and the Court, at page 124, uses this language:

"It does not seem to be denied by the appellant, and we think it must be conceded, that the petitioner is entitled to an exemption from taxation on this land to the extent of \$1,000 of its value, as she invested that amount of her pension money in its purchase."

In *Worden vs. Oneida County*, 35 App. Div., at page 209, the Court held that realty paid for with pension money received by a widow of a deceased soldier was exempt from taxation under section 1393 of the Code of Civil Procedure.

Broderick vs. City of Yonkers, 22 App. Div. 448.
Y. C. N. Bank vs. Carpenter, 119 N. Y. 550.

These authorities seem to settle the question which is before me for consideration, but I am not unmindful of the opinion rendered by Attorney-General O'Malley at page 572, in Report of 1909. In the light of the judicial decisions hereinbefore referred to, I am forced to disagree with my predecessor.

I am, therefore, of the opinion that real property purchased by a widow of a soldier, with her pension money, is exempt from taxation to the extent of such pension money invested therein up to the sum of \$5,000.

Dated, June 24, 1916.

E. E. WOODBURY,
Attorney-General.

To STATE TAX COMMISSION, Albany, N. Y.

SECTION 52, VILLAGE LAW.

It is necessary that a printed notice of an annual village election and of any proposition to be voted upon thereat, should be posted in six conspicuous places in the village at least ten days prior to such election, and failure to post such notices as above indicated would render the vote void.

INQUIRY

Does that portion of section 52 of the Village Law providing for the posting of printed notices of the election in six public places within the village, mean that such posting shall be done at least ten days prior to said election?

OPINION

By a letter under date of June 21st, 1916, I am informed that an election was held in the village of Hempstead on the 21st day of March, 1916, for the election of village officers and also for the purpose of voting upon a proposition to buy new equipment for the fire department of said village. That the notice was duly published in all the village papers in such village, ten days or more before such election, but that notices were posted in six conspicuous place in said village *only four days* prior to such election. The notice so posted and published gave notice to the inhabitants of such village that a proposition would be voted upon at such village election to appropriate the sum of \$20,000 for the purchase of improved fire apparatus, and for the issuance of bonds for that amount to pay therefor. The proposition was carried by a large vote in favor thereof but the bank which bid in the bonds refuses to take the same upon the ground that the village clerk failed to post the six notices ten days or more before the election.

It is provided by section 52 of the Village Law in part as follows:

“* * * The board or such members thereof as are in office, also shall, at least ten days before the election, cause notice thereof to be published at least once in the official paper, if such paper is published in the village, and a printed copy thereof conspicuously posted in at least six public places in the village, specifying the time and place or places of holding the election, the hours of opening and closing the polls

thereof, the offices, if any, and the term to be filled, and setting forth in full all propositions to be voted upon.
* * * An annual election of the village officers shall not be invalid because of a failure to give such notice. A vote upon a proposition shall be void unless due notice of the election has been given.* * *

The last sentence above quoted seems to settle the question involved in this inquiry. The "due notice of the election" includes the posting of the six printed copies of the notice as well as the publication thereof in the village paper or papers at least ten days prior to the election and if either step is omitted the vote upon such a proposition is void by force of the very statute which provides just how it can be submitted.

If a posting of four days would meet the requirements of the statute then a posting of a day or even less would answer and the purposes of the Legislature in providing for a ten days posting would be completely nullified and rendered useless. As a means of bringing the proposition to the attention of the voters of a village, the posting of six printed slips ten days before the election in very many villages would give the same greater publicity than the publication in the village paper or papers, and particularly in those villages where no paper is published, the posting would be the only means of bringing the proposition to the general public.

If the omission to post the notices the full ten days before the village election was a mere informality it probably could be legalized by the Board of Supervisors as provided by section 15 of the County Law; but it cannot be held to be only an informality as it is a statutory prerequisite to the submission of such a proposition and must be fully complied with, and unless the publication thereof fully conformed to the statute, the vote thereon, in the language of the statute, "shall be void."

In *Village of Canandaigua v. Hayes*, 90 App. Div. 336, it was held that where the notice did not sufficiently state the time when the bonds should become due as provided by section 5 of the General Municipal Law, that the bonds issued thereunder were invalid.

The authority to borrow money by a town or village is purely statutory and every step, therefore, required by the statute must be shown to have been in strict conformity therewith.

It has been held in several cases that where bonds have been issued by a municipality without the requisite consent of two-thirds of the taxpayers, where such consents are necessary, that the bonds issued thereon are void in the hands of a bona fide holder.

Town of Venice v. Woodruff, 62 N. Y. 462.

Starin v. The Town of Genoa, 23 N. Y. 440.

And it is also held that it is incumbent upon the plaintiff seeking to enforce payment of such bonds to establish by competent evidence the consent of such two-thirds of taxpayers.

I am of the opinion that the failure of the village trustees to post the six notices of the annual election and the proposition to be voted upon at such election, at least ten days prior thereto, rendered such vote void, and that bonds issued in pursuance of such vote would be invalid.

Dated, June 29, 1916.

E. E. WOODBURY,
Attorney-General.

To THE BOARD OF TRUSTEES OF THE VILLAGE OF HEMPSTEAD,
Hempstead, N. Y.

WORKMEN'S COMPENSATION LAW, SECTIONS 2 AND 3 — APPLICATION TO
EMPLOYEES OF THE STATE AND MUNICIPALITIES.

The Workmen's Compensation Law as amended by chapter 622 of the Laws of 1916 is applicable to the employees of the State or a municipal corporation or other subdivision thereof wherever such employees are engaged in any of the hazardous employments classified in section 2 of the law, notwithstanding the definition of the term "employment" in subdivision 5 of section 3 of the law which restricts such term to a "trade, business or occupation carried on by the employer for pecuniary gain."

Since group 13 of section 2 of the act covers employees engaged in "paving; road building, curb and sidewalk construction or repair; * * *," it is compulsory for a town to provide compensation insurance for the workmen employed by it upon the highways of such town.

Where the State or municipal corporation or other political subdivision has no fund available for the payment of a premium for insurance in the State fund or with any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in this State, such compensation may be secured upon application to the State Industrial Commission to be made a self-insurer under section 50 of the Compensation Law.

INQUIRIES

The State Commissioner of Highways and various town superintendents of highways and other town and city officers have sub-

mitted inquiries as to the effect of the amendment to the Workmen's Compensation Law, by chapter 622 of the Laws of 1916, in its application to the employees of the State, its municipal corporations and other political subdivisions thereof.

OPINION

Chapter 816 of the Laws of 1913 which originated the present Workmen's Compensation Law of this State defined the term "employer" as not including the State or a municipal corporation or other political subdivision thereof. (Laws of 1913, chapter 816, section 3, subdivision 3.)

By chapter 316 of the Laws of 1914, the definition of "employer" was amended to read as follows:

"'Employer,' except when otherwise expressly stated, means a person, partnership, association, corporation, and the legal representatives of a deceased employer, or the receiver or trustee of a person, partnership, association or corporation, employing workmen in hazardous employments, *including* the State and a municipal corporation or other political subdivision thereof."

The term "employment" was, however, defined in subdivision 5 of section 3 of the Compensation Law, as follows:

"'Employment' includes employment only in a trade, business or occupation carried on by the employer for pecuniary gain."

On June 9th, 1914, the matter of the application of the Compensation Law to the State, its municipalities and political subdivisions was considered by Attorney-General Carmody and an opinion was rendered by him to the effect that these two definitions had to be harmonized and that the restrictions of the term "employment" were applicable to the State, its municipalities and political subdivisions and that their employees were only subject to the Compensation Law so far as they were engaged in an employment carried on by the State or municipality or other political subdivision for pecuniary gain. (Attorney-General's Opinions, 1914, p. 191.)

By chapter 622 of the Laws of 1916, the Workmen's Compensation Law has been amended by adding to section 2 thereof, a new group known as Group 43, which reads as follows:

"Group 43. Any employment enumerated in the foregoing groups and carried on by the State or a municipal corporation or other subdivision thereof, notwithstanding the definition of the term 'employment' in subdivision 5 of section 3 of this chapter."

The Legislature has thus clearly brought within the provisions of the statute any employees of the State or a municipal corporation or other subdivision thereof who are engaged in any of the hazardous employments set forth in Groups 1 to 42 of Section 2 of the Compensation Law irrespective of the fact whether the State or a municipal corporation or other political subdivision is engaging in the trade, business or occupation for pecuniary gain.

It is, therefore, clearly the duty of the proper officers of the State, its municipal corporations and other political subdivisions to examine the various groups of employment covered by the act as set forth in section 2 thereof and to secure the payment of compensation to such employees as may be covered thereby in one of the ways provided by the statute.

Section 50 of the Compensation Law provides that an employer shall secure compensation to his employees in one of the following ways:

"1. By insuring and keeping insured the payment of such compensation in the State Fund, or

"2. By insuring and keeping insured the payment of such compensation with any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in this State. If insurance be so effected in such a corporation or mutual association, the employer shall forthwith file with the commission, in form prescribed by it, a notice specifying the name of such insurance corporation or mutual association and such information regarding the policies as the commission may require.

"3. By furnishing satisfactory proof to the commission of his financial ability to pay such compensation for himself,

in which case the commission may, in its discretion, require the deposit with the commission of securities of the kind prescribed in section 13 of the Insurance Law, in an amount to be determined by the commission, to secure his liability to pay the compensation provided in this chapter. The commission shall have the authority to revoke its consent furnished under this section at any time for good cause shown." (Section 50 of the Compensation Law, as amended by chapter 622 of the Laws of 1916.)

I have been specifically asked whether the employees of the town superintendent of highways of a town are covered by the Workmen's Compensation Law. It is my judgment that it is compulsory for a town to provide compensation insurance for the workmen employed upon the highways of the town. This seems to be expressly covered by Group 13, which reads as follows:

"Group 13. Paving, road building, curb and sidewalk construction or repair; * * * *"

I have also been asked as to what fund may be used for the payment of such compensation insurance. In view of the fact that State and municipal employees have not been considered heretofore as coming within the provisions of this statute except in the isolated cases where the State or a municipality might be deemed to be carrying on an occupation for pecuniary gain, it must be assumed that the various municipalities of the State have not made provision for the payment of the premiums for such insurance in the annual budget for the current year. No moneys are available in such cases unless embraced in some contingent fund or, unless special authority has been granted by statute which has not come to my attention. I am informed by the State Industrial Commission that a resolution has been passed by that commission permitting the State, its municipal corporations and other political subdivisions to become self-insurers which seems to me to be the only practical solution available at this time. It is therefore to be assumed that upon the application to the State Industrial Commission by the proper officials of any municipal corporation or other political subdivision of the State permission will be granted to secure compensation to the employees of such municipal cor-

poration or other political subdivision engaged in any of the hazardous employments covered by the act through the method known as self-insuring. If the State or any municipal corporation or other political subdivision desires to adopt one of the other methods of insuring for the ensuing fiscal year, it will have to do so by making suitable provision therefor in its next budget.

Dated, July 3, 1916.

E. E. WOODBURY,
Attorney-General.

To THE STATE COMMISSIONER OF HIGHWAYS ET AL.

MEMORANDUM

The State and the counties, cities, towns and villages of the State must now insure under the Workmen's Compensation Law all of their employees who are engaged in the hazardous employments enumerated in that law in the same manner as private employers are so compelled.

The Attorney-General has so ruled as a result of a recent amendment of the law. Formerly he had ruled that because the State and its municipalities were not engaged in business for pecuniary gain like the average employer, their employees did not come within the provisions of the law.

The State Commissioner of Highways and various town superintendents of highways have submitted inquiries to the Attorney-General as to the application of the recent amendment to employees working upon the highways of the State and of the various towns and the Attorney-General has ruled that employees engaged in road building are specifically covered by the act and that it is compulsory for the State and for the towns to provide compensation insurance for the workmen employed by them upon such highways.

A question has also arisen as to the method by which the State and its municipalities may take out such insurance. The State Industrial Commission has taken cognizance of the fact that since this requirement of law was made subsequent to the appropriation for this year, the State and its counties, cities, towns and villages of money for the public purposes of the State and its municipalities

cannot be assumed to have made provision for the payment of the necessary premiums of insurance for their employees. The commission has therefore adopted a resolution to the effect that upon application to it, it will permit the State or any municipality to carry its own insurance. No moneys are available for the payment of premiums of insurance unless embraced in some contingent fund or unless special authority has been granted by some special statute. The Attorney-General in his opinion has approved of the method adopted by the commission of permitting the State and its municipalities to carry their own insurance rather than to insure in the State Fund or in any insurance company, in the absence of some contingent fund from which the necessary moneys may be drawn. If the State or any municipality desires to adopt one of the other methods of insuring next year, it will have to do so by making suitable provision therefor in its next budget.

Dated, July 3, 1916.

PLATTSBURG CENTENARY — LAPsing OF APPROPRIATION.

Chapter 616 of the Laws of 1915 which amended chapter 95 of the Laws of 1914, entitled "An act enlarging the powers of the Commission created to provide for the celebration of the Centenary of the Battle of Plattsburg and making an additional appropriation therefor" in relation to the acquisition of a site for a memorial to Thomas Macdonough, did not have the effect to repeal and re-enact the provision in the original act with reference to the appropriation provided for therein, but such provision must be deemed to remain in force as from the time of the original enactment and thus the appropriation must be deemed to have lapsed within two years next after the passage of chapter 95 of the Laws of 1914 which became a law on April 3rd, 1914.

Chapter 116 of the Laws of 1916 reappropriated only the unexpended balance of sixty-two thousand five hundred dollars (\$62,500) which became available when chapter 95 of the Laws of 1914 took effect and did not reappropriate the sixty-two thousand five hundred dollars (\$62,500) made available by such act on November 1st, 1915.

INQUIRY

Chapter 95 of the Laws of 1914, section 2, appropriated one hundred and twenty-five thousand dollars (\$125,000) or so much thereof as might be necessary for the erection or to aid in the erection of a memorial, authorized by such act, to Thomas Macdonough in the city of Plattsburg, New York, and for other purposes set forth. Section 2 further provided as follows:

"Of the amount hereby appropriated, the sum of sixty-two thousand five hundred dollars (\$62,500) shall be available when this act takes effect and the sum of sixty-two thousand five hundred dollars (\$62,500) shall be available on November 1st, 1915."

Chapter 95 of the Laws of 1914 was amended by chapter 616 of the Laws of 1915, by inserting in section 1 thereof the following:

"The commission may select a site for such memorial either by itself or by co-operation with the government of the United States and shall have power to acquire such site either by purchase or condemnation under the condemnation law as the commission may determine to be most advantageous to the State."

Section 2 thereof was amended by chapter 616 of the Laws of 1915 to read as follows:

"§ 2. There is hereby appropriated the sum of one hundred and twenty-five thousand dollars (\$125,000), or so much thereof as may be necessary, out of any money in the treasury not otherwise appropriated for the said commission for the purpose of defraying the necessary expenses of such celebration for the erection, or to aid in the erection, of the memorial authorized by section one of this act, *and for the cost and expense of acquiring a site for such memorial provided for in section one of this act, as hereby amended*, and for the other purposes set forth in chapters seven hundred and thirty and eight hundred and twenty-eight of the Laws of nineteen hundred and thirteen. Of the amount hereby appropriated, the sum of sixty-two thousand five hundred dollars (\$62,500) shall be available when this act takes effect and the sum of sixty-two thousand five hundred dollars (\$62,500) shall be available on November first, nineteen hundred and fifteen. The moneys hereby appropriated shall be payable by the Treasurer on the warrant of the Comptroller upon the order of the chairman and vice-chairman of the commission, and shall be payable for the purpose, in the manner and subject to the provisions of the acts hereinbefore mentioned."

The question raised is whether chapter 616 of the Laws of 1915 extended the life of the appropriation beyond that originally made by chapter 95 of the Laws of 1914.

OPINION

The Constitution, article 3, section 21, provides as follows:

"No money shall ever be paid out of the Treasury of this State or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made within two years next after the passage of such appropriation act; and every such law making a new appropriation or continuing and reviving an appropriation shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient for such law to refer to any other law to fix such sum."

The appropriation made by chapter 95 of the Laws of 1914, which became a law April 3rd, 1914, lapsed "within two years next after the passage of such appropriation act" under the requirement of the Constitution unless the action of the Legislature by chapter 616 of the Laws of 1915 or by chapter 116 of the Laws of 1916 has served to revive or continue such appropriation. The two years period runs not from the time that the moneys are made available but from the time of the passage of the act and therefore the same period applies to the sum which was made available November 1st, 1915, as to the sum made available on April 3rd, 1914.

Chapter 116 of the Laws of 1916 simply reappropriated the portion of the unexpended balance of the portion that was made available on April 3rd, 1914, and makes no reference to the portion available on November 1st, 1915. The latter must be deemed to have lapsed since April 3rd, 1914, unless it may be said that the amendment of section 2 of chapter 95 of the Laws of 1914 by chapter 616 of the Laws of 1915 effected an extension of the life of the appropriation.

It is my judgment that the life of the appropriation was not extended by the amendment of 1915. It is an elementary rule of

statutory construction decided in this State as early as the case of *Ely v. Holton*, 15 N. Y. 595, and uniformly maintained that where an amendment is made by declaring that the original statute "shall be amended so as to read as follows," retaining part of the original statute and incorporating therein new provisions, the effect is not to repeal and then re-enact the part retained, but such part remains in force as from the time of the original enactment while the new provisions become operative at the time the amendatory act goes into effect. In other words, if an amendment does not change the original law but simply adds something to it, the amendatory law does not operate to repeal the old law and then re-enact it and the appropriation made in 1914 by chapter 95 cannot be deemed to have been re-enacted by the amendment of 1915, chapter 616. The rule of construction which I have cited is applicable in the absence of any clear intention on the part of the Legislature to the contrary and we find upon an examination of section 2, as amended, that no change was made with reference to the appropriation itself or the time of its availability, but only an amendment adding a new purpose for which the moneys might be expended.

The Legislature itself has adopted this construction by the inclusion in part 6 of the appropriation bill for 1916 of an item of reappropriation of sixty-two thousand five hundred dollars (\$62,500) for the Plattsburg Centenary Commission. This was in addition to the sixty-two thousand five hundred dollars (\$62,500) appropriated by chapter 116 of the Laws of 1916, and was not a duplication thereof. It was vetoed, however, by the Governor.

My conclusion therefore is that no part of the appropriation made by chapter 95 of the Laws of 1914 is available for the expenditures necessary to select a site for such memorial unless there is an unexpended balance of that portion of the appropriation which was made available on the 3rd of April, 1914.

Dated, July 8th, 1916.

E. E. WOODBURY,
Attorney-General.

HIGHWAY LAW, SECTIONS 123-146, 170 TO 174 INCLUSIVE AS AMENDED BY CHAPTER 578, LAWS OF 1916; SECTION 78 OF THE CHARTER OF THE CITY OF ROME; SECTION 102 OF THE CHARTER OF THE CITY OF ONEIDA; SECTIONS 3 AND 87 OF THE CHARTER OF THE CITY OF SARATOGA AS AMENDED BY CHAPTER 220, LAWS OF 1916; CHAPTER 172 OF THE LAWS OF 1916, RELATING TO THE CITY OF SHERRILL.

Permits, bonds and cash deposits by contractors. Uncompleted contracts. Streets in the outer tax districts of the cities of Rome and Oneida. Streets in city of Saratoga Springs. Highway taxes and streets in the city of Sherrill.

INQUIRIES

1. Is it necessary under section 146 of the Highway Law for the State Department of Highways to issue permits for work on city streets which have been improved by State aid?
2. What should be done with the bonds given by contractors upon the execution of contracts for the improvement of streets within a city where the three years guaranty specified in such bonds has not expired?
3. What arrangement should be made about cash deposit left by such contractors which has not been returned to the contractor within one year after the completion of the road for the repair of city streets?
4. What should be done with those contracts that have been executed as to the repair of city streets, and bonds executed and delivered for the fulfillment of such contracts, but work not yet completed?
5. How should the taxes for the repair and maintenance of improved highways within the outer tax districts in the cities of Rome and Oneida be levied since the amendments of 1916?
6. The same inquiry is made as to the taxes for road work within the inner and outer districts of the city of Saratoga Springs.
7. Should the Highway Department continue to maintain the roads lying within the boundaries of the city of Sherrill?

OPINION

All of the above questions relate to the conduct which should be pursued by the State Highway Department in reference to the future maintenance of streets within the limits of cities which have been constructed in whole or in part by State aid; and the dis-

position of bonds and cash deposits which have been executed and are now held until the expiration of the guaranty periods, since the enactment of chapter 578 of the Laws of 1916, and the same will be answered in the order in which they were propounded.

The first question relates to the necessity of the Highway Department to issue permits under section 146 of the Highway Law.

Prior to the enactment of the above mentioned chapter 578 of the Laws of 1916, the Commission of Highways was given supervision and control of all State and county highways in cities of the third class, which had been constructed pursuant to the provisions of section 137 and 138 of the Highway Law, as they existed prior to the amendments of 1916, and the above mentioned section 146 prohibits all persons, firms or corporations from entering or constructing upon any State or county highway any street surface railroad, "or any works in or upon any such highway, or, to construct any overhead or underground crossing thereof, or lay or maintain therein any drainage, sewer or water pipes underground, except under such conditions and regulations" as the Commissioner of Highways may prescribe.

It is apparent by the changes made in sections 170, 171 and 172 of the Highway Law, as amended by such chapter 578, Laws of 1916, that the Legislature intended to change the policy of the law as it stood before such act took effect in reference to the maintenance of the State and county highways in cities of the third class, and to discontinue all further work of maintenance and repair by the State, of streets within the corporate limits of such a city (except such work therein as was provided for by some special statute), and to withdraw from such cities all future State aid for the maintenance and repair of streets within such cities, and it seems quite illogical and inconsistent to hold that the Legislature intended to withdraw all State aid for such upkeep of city streets and still retain supervision over the same even to the extent of granting permits for the work specified in section 146 of the Highway Law.

It is provided by such section that any person, firm or corporation violating the provisions thereof should be subject to a fine of not less than \$100 or more than \$1,000, to be recovered by the State Highway Commissioner and paid over to the State Treas-

urer to the credit of the fund for the maintenance of State and county highways. It cannot be presumed that the Legislature intended to take the State out of all further responsibility and expense for city streets and cast the burden entirely upon such municipalities and at the same time recover for penalties for the doing of work thereon without a permit and turn all the money collected for such violations into the general highway funds of the State. It is much more likely that the Legislature overlooked the necessity of an amendment to such section, or that it was left in its unamended form to apply to highways outside of such cities. However, the statute still remains unrepealed and unamended and applies to all State and county highways without regard to the location thereof, and cannot be ignored or disregarded, and until some change is made by the Legislature, I think it would be the safer practice for any parties about to do any work upon State or county highways within such cities, to obtain, and the commission to grant, the permits provided for by section 146 of the Highway Law.

The second inquiry relates to the bonds given by contractors, upon the award of contracts, and each contains a provision by which such contractors agree to maintain and repair the wearing surface of the road for a period of three years after the completion of the contract. Each bond is signed by some surety company and some of these bonds are still held by the Highway Commission as the guaranty period of three years has not yet expired, and in view of the changes made by the amendment of sections 170 to 174 inclusive, by chapter 578 of the Laws of 1916, which eliminate the State from all future supervision over or expenditure for the maintenance or repair of State and county highways within the corporate limits of cities of the third class, the inquiry is made as to what course should be adopted in reference to such bonds and the enforcement of the guaranties provided therein.

The only change made by the above legislation is to transfer the burden and responsibility of maintaining the State and county highways which have been constructed in certain cities, from the State to the city, and these bonds were all given to assure and guarantee the surface conditions of such streets for a period of three years after completion, and the wear and tear of such streets

cannot be any greater or the liability of the contractor or his bondsmen increased, by the transference of the maintenance of such streets from the State to the city, and neither the contractor nor surety is in any way injured by such transfer, nor is the contract impaired or liability increased by such change. The fact that the Legislature has transferred the expenses connected with the maintenance and repair of such highways within certain cities back upon such cities where they rested prior to the year 1912, in no way relieves the contractors and their sureties from their contractual obligations which were made by them before the amendments of 1916 took effect.

Each contractor agreed that he would "promptly make and execute, free of charge, any and all repairs to said part of said road and renew all such materials as aforesaid, as may become necessary from ordinary and legitimate wear and tear, from natural causes, or from defective materials, and to restore said portion of said work to the proper grade if it falls below it at any place, and remedy all such defects as may disclose themselves during said period of three years, even if the repairs are not or cannot be made during the said term."

This is a continuing obligation against the contractor until the expiration of the three years notwithstanding the fact that the maintenance and repair of such city streets has been imposed upon the city.

These bonds should be held as they have been heretofore, until the expiration of the three-year period, and if the city authorities of any particular city where State or county highways have been constructed by the State should make any complaint as to the condition of such roads, they should be inspected by the Highway Department and if they are found in a condition requiring repairs as provided by their contracts, the contractor should be given notice of the condition of such streets, and a demand made upon them for the repair of the same, and if he should make default in making such repairs the subject will be given further consideration.

The third inquiry involves the disposition to be made of the cash deposit of five per centum of the contract price made by each contractor, which is held by the State for one year after the acceptance of the road.

This money is held as an additional guaranty against defective work or material which may be disclosed by use of the road for a year after its completion.

Those cash deposits should be held by the Highway Department the same as the bonds, and what has been said in relation to such bonds will apply with equal force to the cash deposits.

The State Department should co-operate with the cities in the disposition of both the bonds and cash so long as they continue in force, and the cash should not be returned or bonds surrendered until the cities are fully apprised thereof and opportunity given them to make any complaint as to the condition of such roads.

The fourth inquiry relates to the disposition that should be made of those contracts which have been executed as to repairs of city streets and bonds executed and delivered for the fulfillment of such contracts but work not yet completed.

All contracts which had been fully made and signed by the respective parties, bonds executed and delivered by the contractor, and contracts approved by the Comptroller, for maintenance and repair work on State and county highways in cities, so that the same had become binding and effective contracts upon both the State and contractor at the time chapter 578 of the Laws of 1916 took effect, whether the work thereon had been commenced or was only partially done, will have to be carried out by the contractor and paid for by the State according to the terms and conditions of such contracts in precisely the same manner as if the amendments of such act had not been made. The amendments of section 170 to 174 inclusive, worked a repeal by implication of those provisions which existed prior to such amendments relating to the maintenance and repair of State and county highways within cities of third class, so far as future work is concerned.

Section 93 of the General Construction Law which is entitled "Effect of Repealing Statute upon Existing Rights," reads as follows:

"§ 93. EFFECT OF REPEALING STATUTE UPON EXISTING RIGHTS. The repeal of a statute or part thereof shall not affect or impair any act done, offense committed or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to the time such repeal takes

effect, but the same may be enjoyed, asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if such repeal had not been effected."

The amendments in question are silent as to existing contracts, neither is there any saving clause for such contracts — it simply drops out of all such sections all provisions relating to the maintenance and repair of State and county highways within cities of the third class.

Section 172-a, is a saving clause and provides that the money deposited by a city with the county treasurer for the maintenance of streets within such city in accordance with the provisions of section 172 of the Highway Law as it existed prior to April 1, 1916, and if there remains an unexpended balance in the hands of such treasurer when the chapter 578 of the Laws of 1916, took effect (May 17, 1916), that it should revert to such city and should be expended by the city upon streets which had been constructed or improved by State aid, but can this saving clause be held to apply to moneys which had been deposited with county treasurers by the city for its share upon contracts for maintenance repairs which had been previously made, or was it intended simply to apply to such moneys as had been deposited with the county treasurers for general maintenance of such streets? There must be many city streets which have been constructed in whole or in part by State aid upon which no contract work is being done, and as the State is now eliminated from all further connection with work upon such streets, the above mentioned saving clause was very necessary; but is it presumable that the Legislature, knowing its obligations under contracts which had been made before the passage of these amendments, would legislate itself out of the cities' unexpended contributions for all work thereafter done by the State upon contracts previously entered into? The last sentence of the saving clause provides that all unexpended balances shall be applied upon the maintenance and repair of streets within the cities which have been improved by State aid, thus indicating the legislative intent to have such moneys applied to the purposes for which they were appropriated.

There is nothing in the amendments indicating a purpose on the part of the Legislature to avoid the effect of section 93 of the

General Construction Law and without any clear, affirmative provision which would clearly indicate an intent on the part of the Legislature to abrogate the provisions of such section 93 so far as it would apply to these uncompleted contracts, it must be held as forceful and controlling in reference to such contracts as if no repeal had been enacted.

- Cameron v. N. Y. & M. V. W. Co., 133 N. Y. 336.
People ex rel. City of Niagara Falls v. N. Y. C & H.
R. R. R. Co., 158 N. Y. 410.
People ex rel. City of Buffalo v. M. C. & H. R. Co.,
156 N. Y. 570.
People ex rel. Standard G. L. Co. v. Gilroy, 67 Hun,
323.
G. W. Ry. Co. v. N. Y. C. & H. R. R. Co., 163
N. Y. 228.
People v. Mulford, 140 A. D. 716.

The State is confronted by one of two alternatives. It must either proceed and complete all contracts which became binding and effective before those amendments took effect, or refuse to complete and pay the damages resulting from such refusal.

"There is not one law for the sovereign and another for the subject. * * * Both stand upon equality before the law, and the sovereign is merged in the dealer, contractor and suitor."

- People v. Stephens, 71 N. Y. 549.
Danolds v. State, 89 N. Y. 36.
People ex rel. Graves v. Sohmer, 207 N. Y. 451.

I am of the opinion that all contracts which had been fully consummated for the repair of such city roads before the amendments took effect should be carried and completed by the commission according to the terms and provisions thereof.

The fifth inquiry relates to the repair and maintenance of city roads within the outer districts in the cities of Rome and Oneida, and how the taxes for such streets and highways should be raised since the amendments of 1916.

In the charter of the city of Rome, as amended by chapter 468 of the Laws of 1905, it is provided that from and after January 1, 1906, the highways of that portion of the city lying outside of the corporation tax district,

“ Shall be maintained, repaired and permanently improved by a tax to be levied and collected the same as town taxes, upon the property, real and personal in that portion of the city situate outside of the corporation tax district. * * * Chapter 115 of the Laws of 1898, entitled, ‘ An act to provide for the improvement of public highways’ and all acts amendatory thereof or supplemental thereto, shall apply to any public highway or section thereof situate outside of said corporation tax district, and the portion of said city lying outside of said corporation tax district, shall be deemed a town for all purposes of said act or acts, any general or special statute to the contrary notwithstanding.”

It is provided by section 102 of chapter 63 of the Laws of 1916, being amendments to contain provisions of the charter of the city of Oneida, that:

“ Article six and seven of the Highway Law, and all acts amendatory thereof and supplementary thereto, shall apply to any public highway or section thereof situate outside of said corporation tax district; and the portion of said city lying outside of said corporation tax district shall be deemed a town for all purposes of said act, any general or special statute to the contrary notwithstanding. That portion of the city lying without such corporation tax district shall also be deemed a town for the purpose of securing the benefits secured to towns for the improvement of roads provided in article five of the Highway Law and all acts amendatory thereof and supplementary thereto.”

Provision is also made in both of such charters for the care of the funds raised and appropriated for highway work outside of the corporation tax districts in both of such cities, and the expenditures of such funds separate and apart from other city highway funds and the funds for such outer districts are provided for, both

State and local, in the same method as if such outer districts were towns.

By section 123 of article VII of the General Highway Law, providing for the construction and improvement of State and county highways, and providing in part as follows:

“ Such highway or section thereof shall not include a portion of a highway within a city, except that portion of the cities of Rome and Oneida lying outside of the respective corporation tax districts of said cities.”

This section was not touched directly by the recent amendments as to the maintenance of highways, and considering the method by which the maintenance and repairs of city streets in third class cities were eliminated from further State aid, I think it is very apparent that the Legislature did not intend to withdraw the State's aid from the outer districts in either of the above mentioned cities, and further these acts relating to the above mentioned cities are both special statutes, and the provisions thereof are not affected by general legislation unless the intent to do so is clear.

City of Jamestown v. Home Telephone Co., 125
A. D. 1.

I do, therefore, advise you that the taxes for repair and maintenance of highways in the outer tax districts of both cities should be raised and levied as if such districts were towns, in the same manner in which they were raised prior to the amendments of this year.

The sixth inquiry relates to the taxes for the repair and maintenance of highways within the inner and outer districts in the city of Saratoga Springs.

By section three of chapter 229 of the Laws of 1916 (being an amendment to the city charter of the city of Saratoga Springs), it is provided that the city shall be divided into three tax districts to be known as the “City Tax District,” the “Inside Tax District” and the “Outside Tax District,” as follows:

“ The city tax district shall consist of the territory within the boundaries of the former town of Saratoga Springs, and

the inside tax district shall consist of the territory within the boundaries of the former village of Saratoga Springs, and the outside tax district shall consist of the territory outside of the inside district."

It is provided by section 87 of the same act, how the taxes for the construction and maintenance of highways and bridges within such districts shall be apportioned and paid by the respective districts, but I am unable to find any provision in such charter or the General Highway Law since the amendments of this year, by which State aid can be given or contributed for the maintenance and repair of *any* of the streets of the city of Saratoga Springs, and the city is compelled to raise its own taxes for bridge and highway maintenance within its corporate limits as provided by its charter without contribution from the State.

The seventh and last inquiry relates to highways within the boundaries of the city of Sherrill.

The city of Sherrill was incorporated by chapter 172 of the Laws of 1916 and as I am informed, lies within the town of Vernon, Oneida county, and takes in a portion or all of what has heretofore been known as the "Oneida Community" and becomes by its incorporation a city of the third class. Lying within the boundaries of the city is an improved county highway which has been maintained and repaired under the supervision of the State Highway Department in the same manner as all other county highways are maintained.

"* * * For the purposes of town meetings, general election, general taxation, the Liquor Tax Law and the relief or support of the poor, the city hereby created shall stand in the same relation to the town of Vernon, the county of Oneida, and the State of New York."

It is claimed that this provision places the city upon a level with villages as to its highways and that the State is still bound to maintain and repair the county road within its borders and that all the city is obliged to contribute towards such maintenance is the sum of $1\frac{1}{2}$ cents for each square yard of surface of such improved road within the city, being the same rate provided for villages as specified in section 172 of the Highway Law.

If the words "general taxation" used in the above quoted part of section 3 of the City Charter can be construed to cover "highway taxes," I do not think the Legislature intended to exempt the city of Sherrill from the operation of the amendments of 1916. There is no exception made in section 172 of the Highway Law as to such city although it was amended and took effect some forty days after the City Charter had taken effect and both enactments were by the same Legislature; and both took effect immediately. The same rule will apply to the city of Sherrill as to any other special or local law, i. e., that it will not be affected by general legislation unless the intent to do so is clear and manifest and this intent can only be gathered by an examination of all statutes relating to such subject and the order and manner in which they are made and the purposes for which they were enacted.

It is provided in section 4 of the City Charter, in part, that:

"Such municipal corporations shall have all the powers and be subject to all the obligations of a city of the third class except as inconsistent with the provisions of this act.
* * *"

One of the "obligations" of all cities unless they are especially excepted or exempted, since the amendments of sections 170 to 174 of the Highway Law, is to care for, maintain and repair its own streets whether they were constructed by the State aid or not, and this obligation must rest upon the city of Sherrill in common with other third class cities unless it can be shown that the Legislature intended it should be exempt from such obligation. There is nothing in the charter to indicate such an intent without giving the words "general taxation" a strained and doubtful construction, and thus make them applicable to "highway taxes" as well.

The city of Sherrill is to be governed by a commission and by section 100 of the charter it is provided that the city shall constitute a separate highway district and the commission is vested with the care, supervision, control and improvement of its public highways, streets, avenues, alleys, sidewalks, public grounds and aqueducts therein and cause the same to be kept open and in repair and no distinction is made as to State or county highways therein. By section 102 it is provided that:

"The commission may discontinue, lay out, widen, narrow, straighten, open, alter or change the grade of any roads, avenues, streets, alleys, public parks, squares, lanes, cross-walks and sidewalks within the city, * * * provide for construction, reconstruction, repair and maintenance by contract or directly by the employment of labor, of all things in the nature of streets or highway improvements."

Here are provisions vesting the whole supervision, control and maintenance and repair of all the streets in the city, whether constructed by State aid or otherwise, in the authorities of the city. These provisions are utterly repugnant to and inconsistent with the provisions of section 170 of the Highway Law, as it stood before the amendment of 1916, for by such last mentioned section the maintenance and repair of all improved State and county highways, whether in city, village or town, prior to such amendment, were under the direct supervision and control of the State Commission of Highways. Under the section as now amended all such State and county highways in villages and towns are still under the direct supervision and control of the State Highway Commission.

The provisions of the City Charter clearly indicate the legislative intent to cast the whole burden of taxation, supervision, control, maintenance and repair of city streets, whether constructed by State aid or otherwise, upon the city of Sherrill, as well as all other cities, except where some special provision was made for some parts of city streets, as in the case of the outer tax districts of the cities of Rome and Oneida. It cannot be argued with reason that if the Legislature intended to continue the State's aid for the maintenance and repair of the State or county highways within the city of Sherrill, that it would abandon all of its supervision and control to the city; and if any such condition was contemplated we would certainly find some provision, either in the charter or in the amendments indicating such an intention besides the ambiguous language used in section three of the charter as to general taxation.

I am very clearly of the opinion that the Highway Department should not continue any further expenditures for, or control over, the county highway within the city limits of the city of Sherrill.

Dated, July 20, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. EDWIN DUFFEY, *Commissioner of Highways, Albany, N. Y.*

SOLDIERS AND SAILORS' VOTE — NEW YORK CONSTITUTION, ARTICLE 2, SECTION 1 — ELECTION LAW, SECTIONS 500-522.

Electors absent from their election districts in the military or naval service of the United States may vote at the coming election.

INQUIRY

The Secretary of State has asked the opinion of the Attorney-General as to whether the present is a "time of war," within the meaning of section 1 of article II of the State Constitution, so as to make it the right and duty of the Secretary of State to carry into effect the provisions of the Election Law for the benefit of electors in the actual military service of the state, or of the United States, and who would otherwise be deprived of the right to vote at the November election by reason of their enforced absence from their several election districts.

OPINION

The importance of this question will be immediately recognized. Thousands of electors whose patriotic spirit has drawn them into the service of the State as members of our State militia, have been mustered into the military service of the United States by order of the President and are now in active military service along the Mexican frontier, engaged in repelling the forays of lawless bandits and ready to resist, if necessary, a more formidable invasion by troops of the de facto government. If it shall be held that this is not a "time of war," within the meaning of our State Constitution, these citizen soldiers, if present conditions continue, will inevitably be penalized for their patriotism by being

deprived of their votes at the November election. Such a result should be avoided unless insuperable legal obstacles stand in the way.

Section 1 of article II, of our State Constitution, so far as material to this inquiry, reads as follows:

“Every male citizen of the age of twenty-one years who shall have been * * * for the last thirty days a resident of the election district in which he may offer his vote, shall be entitled to vote at such election in the election district of which he shall at the time be a resident, and not elsewhere, * * * provided that in time of war no elector in the actual military service of the State, or of the United States, in the army or navy thereof, shall be deprived of his vote by reason of his absence from such election district.”

The same section empowers the Legislature to provide the manner in which, and the time and place at which such absent electors may vote, in time of war, and for the return and canvass of their votes in the election districts in which they respectively reside. Pursuant to authority vested in the Legislature by this section, statutory provisions have been enacted providing the necessary machinery for taking the votes of electors while necessarily absent from their election districts in the service of the State or of the general government.

The section of the Constitution above quoted should not be so construed as to narrowly limit the right to vote conferred by it, but rather, in the broad spirit of section 1 of article I of the same instrument which provides:

“No member of this State shall be disfranchised, or deprived of any of the rights and privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers,”

it should be construed so as to safeguard and protect that right. The courts in recognition of this principle have repeatedly held that the power of the Legislature to regulate the matters of registration and elections does not extend to the imposition of conditions which will destroy or seriously impede the enjoyment of the

elective franchise. (Matter of Rupert v. Rees, 212 N. Y. 514; Matter of Hopper v. Britt, 204 N. Y. 524; Matter of Callahan, 200 N. Y. 59; People ex rel. Deister v. Wintermute, 194 N. Y. 99-108.)

It is conceded on all sides that if the present is a "time of war," within the meaning of these words as used in the section first above quoted, then article fifteen of the Election Law becomes operative, and it is the duty of the Secretary of State to put in motion the necessary machinery, pursuant to the statute, for taking and counting the ballots of qualified electors whose absence from their various election districts is rendered imperative by their status as members of the army or navy of the United States. We are brought, therefore, to the consideration of the vital question whether this is a time of war within the meaning of our constitutional provision.

At the outset we are met by the possible objection that this is not a question over which, under our form of government the State, or any department thereof, has any jurisdiction. It may be said that Congress, representing the sovereign power of the Federal government, is the only power authorized to declare war. Granted. We are not asked to declare war against any nation, nor any part of any nation. Not only so, but, were the law department of a State government, or a State court, or even the Legislature of a State, to declare that a state of solemn war existed between the United States and Mexico, such a declaration would not, in the slightest degree, change the status of the nation with respect to its international relations. We are not dealing with any question of international law, nor seeking to place a construction upon any provision of the Federal Constitution or of an act of Congress bearing upon the question of the existence or non-existence of war, as that term is used and understood in the law of nations. On the contrary, we are asked to interpret our State Constitution and to apply one if its provisions to existing conditions, for the guidance of the Secretary of State of this State in the discharge of a most important duty to the electorate of the State. In undertaking the discussion of this question, we are confident that neither the President, nor any of his advisers,

will be in any way embarrassed by any conclusion reached upon the question under consideration.

Speaking generally, it is a recognized principle of international law that only the sovereign power of a nation can declare war; and whether, at any particular time, the status of a nation is that of war, depends upon the action taken by the legislative or other war-making branch of the government. It is conceded that in the United States the power to declare war is vested in Congress.

Mr. Justice Nelson, in his opinion in the Prize cases, 2 Black. 635, in fixing the time when the states in rebellion acquired belligerent rights, said:

“But before this insurrection against the established government can be dealt with on a footing of a civil war, within the meaning of the law of nations and the Constitution of the United States, which will draw after it belligerent rights, it must be recognized or declared by the war-making power of the government. No power short of this can change the legal status of the government or the relations of its citizens from that of peace to a state of war, or bring into existence all those duties and obligations of neutral third parties growing out of a state of war.”

Whether, therefore, a nation is at war with any other nation, at any particular time, depends upon what steps have been taken by the war-making powers of the respective parties tending to create that status; but when the personal rights of individuals are before the courts for adjudication, it becomes a question of law, where the facts are undisputed, as to whether or not a war status exists. While it is incumbent upon the President and Congress to do the things which create such status, it is for the courts in enforcing the law to say whether, under the conditions disclosed at the time, such a status exists.

War is “that state in which a nation prosecutes its right by force.” This definition has been adopted by eminent jurists and was expressly approved by Mr. Justice Grier in his opinion in the Prize cases, *supra*. In the same connection he added:

"The parties belligerent in a public war are independent nations. But it is not necessary to constitute war that both *parties should be acknowledged as independent nations or sovereign states.* A war may exist where one of the belligerents *claims* sovereign rights as against the other."

Two kinds of war are recognized by writers on international law and by the courts of the United States. Perhaps the best definition and description of both kinds of war may be found in the case of *Bas v. Tingy*, 4 of Dall. 37, quoted with approval in *Montoya v. The United States*, 180 U. S. 261.

In the Bas case, Mr. Justice Washington, speaking of war, said:

"If it be declared in form, it is called *solemn*, and is of the *perfect* kind; because one whole nation is at war with another whole nation, and all the members of the nation declaring war, are authorized to commit hostilities against all the members of the other, in every place and under every circumstance. In such a war all the members act under the general authority, and all the rights and consequences of war attach to every condition."

It is not claimed that war of this kind exists between the United States and any other country at the present time. But there is another kind of war, called "imperfect" or "limited" war which, if it exists, makes the time while it is pending, a "time of war," within all the cases. *Imperfect war* is described by Mr. Justice Washington in the Bas case, as follows:

"But hostility may subsist between two nations, more confined in its nature and extent, being limited as to places, persons and things; and this is more properly termed "*imperfect war*, because not solemn, and because those who are authorized to commit hostilities, act under special authority, and can go no farther than to the extent of their commission. Still, however, it is public war, because it is an external condition by force between some of the members of the two nations, authorized by the legitimate powers."

It is conceded that at the present moment amity exists between the de facto government of Mexico and the United States in a

strict legal sense. The two governments are still negotiating through regular diplomatic channels for a friendly settlement of the various matters of difference existing between the two governments. The existing differences have arisen, in part, out of the recent activities of Villa and his followers. But Villa, to say the least, is an insurgent against the de facto government; and he does not even pretend to be acting as the representative, or by authority of the de facto government. His status in this country is that of an independent political and military leader whose methods are those of an outlaw and murderer. His recent raid across the border, and his attack upon the helpless citizens of Columbus, involving murder and robbery in the night time, were not, so far as known, authorized or approved by the responsible government of Mexico. His attack, however, was not aimed against any particular person or class of persons, but against the people of the United States in general, whose bitter enemy he prides himself in being. In his quest for booty, he killed or wounded whoever got in his way.

The Villa raid, while the most formidable and disastrous to the citizens of the United States was by no means the only one. On several other occasions, both before and since the attack upon the village of Columbus, Mexican bandits have crossed the international line, unhindered by the de facto government, and have committed depredations resulting in the loss of life and property.

While it was and is the acknowledged duty of the de facto government to establish and maintain an effective police along the international border, and to prevent incursions of murderous bands of Mexicans into the territory of the United States, the de facto government, through neglect of its duty or its inability, has failed to afford the necessary military protection.

Villa's assault upon the village of Columbus and its inhabitants was immediately followed by a punitive expedition sent into Mexico by the government of the United States for the purpose of capturing or destroying Villa and his hostile force. This expedition was inaugurated, as is claimed, without waiting for the consent of the de facto government; and while Carranza has repeatedly protested against the expedition and its continuance

upon Mexican soil, up to the present moment, it has not been treated by the de facto government as a *casus belli*.

The presence of United States troops, however, beyond the Mexican border has naturally produced strained international relations; and the movement of Mexican troops, in considerable numbers, under orders of the de facto government, toward the international border, and the threatening attitude of Carranza and his advisers, have been regarded as ominous of actual hostilities. Not only so, but after the Pershing expedition had penetrated far into Mexican territory in the vain pursuit of Villa and his bandit soldiers, one of the officers in command of Mexican troops, claiming to act under authority of the Carranza government, notified General Pershing, commander of the United States forces in Mexico, that if the expedition moved from its then present position, in any direction except due north, and toward the international border, Mexican troops under command of the de facto government would attack the United States troops moving as aforesaid, without further notice.

Shortly thereafter the conditions arose which tested the sincerity and authority of this notice, and Mexican troops under the command of General Trevino attacked and killed a considerable number of United States soldiers and took several of the survivors as prisoners. Later these prisoners were returned to the jurisdiction of the United States, pursuant to a peremptory demand by the President.

It is impossible as well as unnecessary, to recount in this connection all of the facts and circumstances which have combined to create the present unfortunate status between the two governments. Enough has been stated, however, to show that *a condition of imperfect war exists between the United States and that part of the Mexican nation represented by Villa and his adherents operating at present on Mexican soil*. To say that the government of the United States is not prosecuting its rights in Mexico and along the international boundary by force of arms, is to ignore all the facts above stated. But these hostilities, as carried on by the United States, are and have been confined in their nature and extent, being limited as to places, persons and things. The Pershing expedition was directed, not against Mexico as an entirety,

but against that portion of the Mexican people who were armed followers of Villa. A war of punishment and reprisal was directed against him and all those under him who took part in his wanton attack. No acts of war were authorized against anybody else or at any other place, except where he and his soldiers might be found. While Villa's attack was aimed against the nation as a whole, the Pershing expedition was special, and the acts of war which could be lawfully committed under the orders governing the expedition were strictly limited thereby.

In like manner the attack by the troops under command of General Trevino claiming to act under direction of Carranza, upon the Pershing expedition, was imperfect war. It was not directed generally against the government of the United States; but against the force under General Pershing, or that part of it acting contrary to the will of Carranza. While negotiations are now pending looking to the withdrawal of the Pershing expedition, a state of imperfect war still exists between the government of the United States and that part of the Mexican people dominated by Villa. The present is therefore, in fact, a time of war within the meaning and spirit of the constitutional provision which we are considering.

An examination of adjudged cases bearing on this question has disclosed nothing in opposition to the views above expressed. *Montoya v. The United States*, 180 U. S. 261, arose in the Court of Claims of the United States to recover damages sustained by claimant in a raid upon his property by an aggregation of hostile Indians known as Victoria's band.

By section 1 of the Act of Congress of March 3, 1891, it was provided that:

"All claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge and not returned or paid for,"

might be presented to the Court of Claims.

In explanation of the purpose of this act, the headnote to the above entitled case (which correctly summarizes the decision) uses this language:

"The object of the Indian depredation act is to enable citizens whose property has been taken or destroyed by Indians belonging to any band, tribe or nation in amity with the United States, to recover a judgment for their value, both against the United States and the tribe to which the Indians belong and which by the act is made responsible for the acts of marauders whom it has failed to hold in check. If the depredations have been committed *by the tribe or band itself* acting in hostility to the United States, *it is an act of war* for which there can be no recovery under the act."

The claimant's property was taken under circumstances described in the headnote as follows:

"Where a company of Apache Indians, who were dissatisfied with their surroundings, left the reservation under the leadership of Victoria, to the number of two or three hundred, became hostile, and roamed about in Old and New Mexico for about two years, committing depredations and killing citizens, it was held that they constituted a 'band' within the meaning of the act; that they were not in amity with the United States and that neither the government nor the tribe to which they originally belonged, were responsible for their depredations."

In the course of the opinion, Mr. Justice Brown, writing for the court, said (page 265) :

"If the depredation be committed by an organized company of men constituting a band in itself, *acting independently of any other band or tribe* and carrying on hostilities against the United States, such acts may amount to a war."

The same opinion contains the following (page 267) :

"We recall no instance where Congress has made a formal declaration of war against an Indian nation or tribe; but the fact that Indians are engaged in acts of general hostility to settlers, especially if the government has deemed it necessary to dispatch a military force for their subjugation, is sufficient to constitute a state of war."

To the same effect is the case of *Marks v. United States*, 161 U. S. 297. This case involved a similar claim, and was predicated on the same statute.

The claim was, in substance, that the Bannock Indians, as a tribe, were in amity with the United States; and that individual of the tribe had committed the outrages which resulted in the damages sought to be recovered. The court, however, *found as a fact* that the tribe was *at war with the United States* and that the case did not come within the beneficial provisions of the statute. The claim was, therefore, dismissed.

The claimant, among other things, insisted that, because no declaration of war had been made either by the United States or by the Bannock tribe; and because the Treaty of 1868 had not been expressly abrogated, the status of the tribe was, as matter of law, that of amity and peace, instead of war. In discussing this phase of the subject, Mr. Justice Brewer, writing for the court, said:

“When the petition filed in the Court of Claims alleges that a depredation was committed by an Indian or Indians belonging to a tribe in amity with the United States, it becomes the duty of that court to inquire as to the truth of that allegation, and its truth is not determined by the mere existence of a treaty between the United States and the tribe, or the fact that such treaty has never been formally abrogated by a declaration of war on the part of either, but that the inquiry is, whether as a matter of fact, the tribe was at the time, as a tribe, in a state of actual peace with the United States. If so, and the depredation was committed by a single individual, or a few individuals without the consent and against the knowledge of the tribe, the court may proceed to investigate the amount of the loss, and render judgment therefor. If, on the other hand, the tribe, as a tribe, was engaged in actual hostilities with the United States, the judgment of the Court of Claims must be that the allegation of the petition is not sustained, and that the claim is not one within its province to adjudicate. It is doubtless true that the existence of a treaty implies a state of peace, and, if no other evidence were produced, the court might properly infer

therefrom that the tribe was in amity with the United States; but, after all, *it is a question of fact*, to be determined by the testimony which may be introduced."

This statement is in harmony with the views hereinbefore expressed to the effect that while solemn war is a political status which can be created and established only by the war-making powers, yet, whenever personal rights are involved, in an action or proceeding before the courts, it is for the courts to determine whether war has actually been declared, and, if not, then whether a state of war of any kind in fact exists.

The case of Thomas v. United States, 39 Court of Claims, Rep. 1, illustrates the same principle. Claimant was a lieutenant-commander in the navy of the United States. Between the 11th day of July and the 15th day of August, 1899, he commanded a ship of the second rate, and thereby performed the duties of captain during the period. The salary attaching to the office of captain was \$4,500 per annum, while that of lieutenant-commander was \$3,500. Claimant insisted that he was entitled to the higher salary for the period of the higher service, basing his claim on section 7 of the Act of Congress of April 26, 1898, which reads as follows:

"Section 7. That in *time of war* every officer serving with troops operating against an enemy who shall exercise, under assignment in orders issued by competent authority, a command above that pertaining to his grade, shall be entitled to receive the pay and allowances of the grade appropriate to the command so exercised." * * *

One of the questions litigated in the Court of Claims was whether the services were rendered in "time of war" within the meaning of the section above quoted.

The services were rendered in Philippine waters after the conclusion of peace with Spain, and during the Aguinaldo insurrection. The Philippine Islands had been ceded to the United States as part of the terms of peace. Aguinaldo had rebelled against the authority of the United States, and portions of the army and navy were engaged in suppressing this rebellion. No war had been declared, and the United States was not making

war upon the people of the islands generally. The hostilities were limited to suppressing the Aguinaldo uprising. This situation answers the description of imperfect war. The government of the United States was prosecuting its rights by force of arms and it was held to be a "time of war" within the meaning of the statute, and claimant was allowed to recover.

Hamilton v. M'Cloughry, 136 Fed. 445, is another case in point. The proceeding was habeas corpus to review the action of a court-martial which convicted petitioner of murder and sentenced him to imprisonment for life at hard labor in the United States penitentiary at Fort Leavenworth, Kansas. The alleged murder was committed by petitioner while his regiment was stationed at Pekin, China, as part of the military force sent there by the United States to aid in suppressing the Boxer uprising. The court-martial was organized and petitioner tried and convicted, pursuant to the fifty-eighth Article of War, which reads as follows:

"In time of war, insurrection or rebellion, larceny, robbery, * * * murder, * * * shall be punishable by the sentence of a general court martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided for the like offense by the laws of the state, territory, or district in which such offense may have been committed."

Petitioner claimed that the homicide was not committed "in time of war, insurrection or rebellion," and that, for that reason, the court-martial was without jurisdiction.

The Boxer movement was not aimed against the government of China, nor against any foreign government in particular, but against all foreigners, of whatever nation, residing or temporarily located in China. The purpose of sending United States troops to China was to aid in protecting the lives and property of citizens of the United States lawfully sojourning in that country. No declaration of war had been promulgated either against China or the Boxer insurrectionists; but it was held to be a time of war because the United States was in China "prosecuting its right

by force of arms." (p. 450, *supra*.) The conviction was affirmed, and the petition dismissed.

The cases thus briefly reviewed are authority for the proposition that the present is a "time of war," within the meaning of our constitutional provision, because, among other things, the United States is in Mexico and upon the border with its militia mobilized and mustered into the United States service "prosecuting its right by force of arms." It is there, not as the enemy of Mexico, but to protect the lives and property of its own citizens located in that and our own country, and to punish those who have wantonly invaded our borders and made war upon our people.

But there is another view of this subject which leads to the same result.

By Act of Congress of May 27, 1908 (35 Stat., 400) it is provided:

"Whenever the United States is invaded, or in danger of invasion from any foreign nation, or of rebellion against the authority of the government of the United States, or the President is unable with the regular forces at his command to execute the laws of the Union, it shall be lawful for the President to call forth such number of the militia of the State or of the States or Territories or of the District of Columbia as he may deem necessary to repel such invasion, suppress such rebellion or to enable him to execute such laws, and to issue his orders for that purpose," etc.

Acting under the authority of this statute, the President of the United States, on the 18th day of June, 1916, called upon the governors of various states for units of the State militia and of the national guard, aggregating over one hundred thousand men. These forces have been mobilized and mustered into the military service of the United States, and many of said units and organizations have been transferred to the Mexican border.

The material part of the President's communication directed to Governor Charles S. Whitman, is as follows:

"Having in view the possibility of further aggression upon the territory of the United States from Mexico, and the necessity for proper protection of that frontier, the Presi-

dent has thought proper to exercise the authority vested in him by the Constitution and laws, and call out the organized militia and the national guard necessary for that purpose."

We must assume that the President of the United States has acted advisedly and that the conditions exist which make it lawful for him to call out the militia of the various states.

It is manifest that, at the present moment, there is neither actual nor threatened rebellion against the authority of the government of the United States, nor has the President found himself unable, with the regular forces at his command, to execute the laws of the union. Moreover, the President does not predicate his right to summon the militia of the states into the service of the general government upon any of these grounds. It is the "possibility of further aggression upon the territory of the United States from Mexico, and the necessity of proper protection of that frontier," that set the executive power in motion. Whether invasion be actual or threatened can make no difference. If the invasion is so imminent, and the danger so great that the President feels it his duty to call out the militia, and does so, our citizen soldiers, so called into the service of the United States, are at once deprived of that liberty of action which would permit them to register and vote in the regular way; unless the emergency and conditions which now exist and which justified the President in calling out the militia would constitute a "time of war," the constitutional provision intended to protect the vote of the militia of the State when serving in the army of the United States is deprived of most of its value.

It should be noted that the amendment to our State Constitution, now under consideration, was drafted in 1863, while about 400,000 citizens of the State, most of whom were electors, were absent from the State, in the service of the United States engaged in suppressing the great rebellion of 1860. The injustice of depriving these electors of their right to vote by reason of this enforced absence from the State in the service of the general government, appealed strongly to the Legislature; and on the 22d day of July, 1863, a bill was passed by the Legislature providing for the taking of the soldier vote at the front, "in time of war, insurrection or invasion." At the same time a Federal statute existed (§ 1642 of R. S.) providing that

" Whenever the United States are invaded, or are in imminent danger of invasion from any foreign nation or Indian tribe, or rebellion against the authority of the government of the United States, it shall be lawful for the President to call forth such number of the militia of the state or states, most convenient to the place of danger, or scene of action, as he may deem necessary to repel such invasion, or to suppress such rebellion, and to issue his orders for that purpose to such officers of the militia as he may think proper."

This section had long been in the statute books (1792) and was the express authority under which President Lincoln acted, in calling out the militia during the early stages of the war. That the Legislature had this statute in mind in framing the bill passed on July 22, 1863, is manifest from the marked similarity of the language used. The Federal Statute authorized the calling out of the militia in time of invasion, actual or threatened, or of rebellion. The bill which passed the Legislature, authorized the taking of the soldier vote in the field "in time of war, insurrection or invasion." "Insurrection" is defined by the Supreme Court of Pennsylvania, in County of Alleghany v. Gibson (90 Pa. St. 397, at p. 417), as being "a rising against civil or political authority; the open and active opposition of a number of persons to the execution of law in a city or state; a rebellion, a revolt." Thus, "insurrection" used in the legislative bill above referred to is the legal equivalent of "rebellion" used in the Federal statute. The provisions are, therefore, identical except that, in the legislative bill the word "war" was used in addition to the terms used in the Federal statute, namely, "insurrection" or "rebellion" from within and "invasion," actual or threatened, from without.

The bill of July 22, 1863, was vetoed by the Governor July 24th as being in contravention of the State Constitution, and on the same day the constitutional amendment which we are now considering, was passed by the Legislature and, after approval of the Legislature of 1864, was adopted by the people at a special election. In the amendment, as adopted, the words "in time of war" were retained and the words "insurrection or invasion" were omitted, evidently upon the principle that the word "war" was the more comprehensive term and included the omitted words.

In the Federal statute, the word "war" is not used at all, but instead one more specific, words "invasion" and "rebellion," either of which would create a "time of war," if armed forces were called into activity to repel the one or repress the other.

The inference to be drawn from the legislative action above referred to, is, therefore, very strong, although perhaps not conclusive, that, in using the words "in time of war," in drafting the constitutional amendment, the Legislature had in mind any emergency, either of invasion, actual or threatened, or of rebellion or insurrection of such nature and proportions as to justify the calling of the military forces into active service.

It would be illogical in the extreme to say that the Legislature, in drafting the constitutional amendment, intended to use the words "in time of war," in any narrower or more restricted sense than would naturally be conveyed by the words "in time of war, insurrection or invasion," as used in the act of the Legislature passed at practically the same time and by the same legislative body.

The commission of 1872, created for the purpose of proposing amendments to the State Constitution, discovered an infirmity in the proviso added to section 1 of article II, by the amendment of 1863. Under the amendment, as originally adopted, the benefits of the amendment were limited to electors who were absent from the State in the actual military service of the United States. It was apparent that territory within the State of New York might be seized by foreign invaders or that insurrection might spring up within our own borders and that the militia might be required to repel such invasion or to suppress such insurrection either at the call of the President or, in the first instance, of the governor of the State. In either of such emergencies, the militia, although engaged in repelling invasion or suppressing rebellion within the boundaries of the State, could not vote under the proviso of 1863, if absent from their election districts. This defect was cured by providing "that in time of war no elector in the actual military service of the State, or of the United States, in the army or navy thereof, shall be deprived of his vote by reason of his absence from such election district." The amendment was adopted by the people in 1874.

By amending the section so as to provide for taking the soldier's vote, when absent from his election district *in the military service of the State*, the constitutional commission of 1872 expressly recognized the fact that actual military operations conducted within the State in repelling invasion or suppressing insurrection would constitute a "time of war" within the meaning of those words as used in the State Constitution. This amendment therefore strengthens and, if needs be, confirms the contention that the words "in time of war" were used in a broad, popular sense and were intended to cover active military operations with the State as well as without.

The Committee on Suffrage of 1872 reported to the Commission as follows on January 27, 1873:

"The committee have also varied the language of the section so as to secure the right of suffrage to electors when absent from their homes in the military service, not only of the United States but of the State, and during such absence, not only from the State but from their respective election districts. It may well be that while absent on such service they may be stationed for longer or shorter periods within the limits of the State and yet at remote distances from those districts."

The same committee again reported to the Commission on March 10, 1873:

"The original section preserves to the elector his right, in time of war, to vote when absent *from the State* in the military or naval service of the *United States*.

"The proposed amendment further protects the right of suffrage when the elector may be so engaged in the military service *of the State*, and when absent, on either service, not merely from the State but from his own *election district*.

"The case may arise of State troops being called to the frontier in the immediate service of the State, and, whether in the service of the State or of the United States, they may, of necessity, be stationed and detained at points within the limits of the State, remote from their own election districts. Their inability to cast their votes at the polls would be as

absolute, if they were thus serving within the State as if they were beyond its bounds. The amendment, securing their right of suffrage, if in such military service, beyond their election districts, effectually protects it in either case."

Observe that the report refers to a case where State troops are called to the frontier in the immediate service of the State. This State service, however, is still to be "in time of war." Now as the State is without power to declare solemn war, the amendment of 1874 must have contemplated that the phrase "in time of war" as applied to State military service, covered instances of imperfect war or actual hostilities arising upon an attempt to invade our State prior to the time when the Federal government might take up the defense and muster the troops into the Federal service. This interpretation is in accord with article I, section 10, paragraph 2 of the Federal Constitution, which confers upon a State power to "engage in war," *i. e.*, in actual hostilities, imperfect war, or whatever we may choose to call it, when "actually invaded or in such imminent danger as will not admit of delay."

Article I, section 10, paragraph 2 of the Federal Constitution referred to, provides:

" * * * No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war, in time of peace, enter into any agreement or compact with another State or with a foreign power, or engage in war, unless actually invaded or in such imminent danger as will not admit of delay."

It follows that military service in repelling invasion (with or without a formal declaration of war) falls within the intent of the soldiers voting clause of our Constitution, and that sort of service is precisely what our troops are now performing in Mexico and upon the Mexican border.

As the Constitution now stands, the elector may, in time of war, vote in the field provided he be outside of his election district in the actual military service either of the State or of the United States. The force and effect of the words "in time of war" must be determined not only by the natural import of the words themselves, but by the construction placed upon similar

words by the courts, in dealing with private rights, and by such aids as the history of the amendment, contemporaneous Federal and State legislation and the facts and circumstances which gave rise to the amendment, provide. If doubt remains, we may call to our aid those canons of construction which the courts have found to be of use in determining the meaning of doubtful or obscure language used in constitutional or statutory provisions.

One of these canons has been stated as follows:

“The intention of the law-maker is sometimes to be collected from the *cause or necessity for making the statute*; and however the intent may be ascertained, it should be followed with reason and discretion, though such construction may seem contrary to the letter of the statute, for it is the intent which often gives meaning to words otherwise obscure and *doubtful*.” (Holmes v. Carley, 31 N. Y. 289, 290.)

If this principle of construction be applied to the constitutional provision now under consideration, the conclusion already reached is greatly strengthened. *The plain purpose* of the amendment is to provide for the taking of the soldier vote in the field whenever the elector's absence from his election district is compulsory by reason of his being in the actual military service of the State or of the United States; but the amendment can operate only in a “time of war.” Any emergency, therefore, whether it be solemn war or imperfect war; whether it be invasion from without either actual or threatened; or insurrection or rebellion within our own borders; if the emergency is such that the State or nation finds it necessary to prosecute its right by force of arms, and to that end to mobilize the military forces of the State and call them into active military service, it is a “time of war” within the meaning of the Constitution, and article 15 of the Election Law immediately becomes operative.

The cases to which we have called attention clearly recognize that a status of imperfect war is a “time of war,” within the meaning of the statutes in which that phrase is used, so far, at least, as private rights may be involved. This status is to be sharply distinguished from solemn or technical war, which in this country can only be declared by act of Congress, and carries with

it far reaching effects upon the rights of the belligerent nations themselves, and upon the rights of neutral nations as well as upon the personal right of citizens.

That "imperfect war" exists, within the authority of these cases, is quite obvious. The territory of our country has been invaded by armed forces from Mexico who are in a state of insurrection against the Mexican government. These armed forces have committed murder upon our citizens and destroyed their property. There is a constant menace and threat of similar invasion. Armed forces of the United States have been sent into Mexico on a punitive expedition to capture or destroy these lawless invaders of our country. General Trevino, claiming to act by authority of the de facto government, has assumed to oppose the movement of the United States troops now on Mexican territory in any direction, save towards the border of their own country.

A battle has actually been fought between soldiers of the United States and an armed military force of the de facto government of Mexico, because, as it is claimed, the soldiers of this country attempted to move in a direction other than towards the border line.

A considerable number of United States soldiers were taken prisoners in this battle and were only surrendered upon the peremptory demand of the President of the United States.

Military forces of the United States are still in Mexican territory, notwithstanding the demand made by the de facto government upon the President that these forces be immediately withdrawn.

Under pressure of these conditions, the militia of the several states have, pursuant to an order of the President, been mobilized upon the Mexican border for the purpose of protecting our citizens and preventing the invasion of our territory. Or, to use the language of the President, "Having in view the possibility of further aggression upon the territory of the United States from Mexico and the necessity for proper protection of that frontier," the militia of the several states have been mustered into the military service of the United States, subject to the command of Federal authority and under the discipline of war.

Every condition exists, respecting the status of the militia of the several states mobilized and mustered into the service of the

United States, which would or could exist "in time of solemn war" as respects their enforced absence from their election districts.

In view of all these facts and conditions, a status of "imperfect war" exists within the authority of the cases cited, and this condition is equivalent to a "time of war" for the purpose of bringing into operation the provision of our Constitution and the statute enacted to carry its provisions into effect for the taking of the soldier vote in the field.

In reaching this conclusion we are giving expression to the true intent and spirit of this constitutional provision, without placing any forced or unnatural construction upon its language.

Dated, July 31, 1916.

E. E. WOODBURY,

Attorney-General.

PROPOSITION TO CHANGE SITE OF COUNTY JAIL — BALLOT UPON WHICH SAID PROPOSITION SHOULD BE PLACED — SECTIONS 331 AND 332, ELECTION LAW.

INQUIRY

Can the proposition to change the site of the county jail be placed on the same ballot with the constitutional amendments and propositions?

OPINION

Section 331 of the Election Law directs that

"there shall be five kinds of ballots called respectively ballots for presidential electors, ballots for general officers, ballots upon constitutional amendments and questions submitted, ballots upon town propositions and ballots upon town appropriations, which shall be used for the purposes which their names severally indicate, and not otherwise."

Therefore we must conclude that the proposition to change the site of the county jail must be placed upon one of the five ballots above enumerated.

Under section 332 of the Election Law, subdivision 5. clause 4, we find a specific direction that

"all ballots for the submission of town propositions for raising or appropriating money for town purposes, or for incurring a town liability to be voted at any town meeting in any town, shall be separate from all other ballots for the submission of other propositions or questions to the electors of such town, to be voted at the same town meeting or election."

The proposition which you are to submit at the coming election is not a town proposition or one for the appropriation of money for town purposes, but, on the contrary, is a county proposition to be submitted to and voted upon by the electors of the whole county. Therefore it becomes evident that from the five separate ballots above enumerated the question of changing the site of the county jail must be submitted to the voters upon the ballot which contains the constitutional amendments and other questions submitted.

This question was adjudicated at a Special Term of the Supreme Court in the Matter of the Application of Arnold for a Special Town Meeting in the Town of Plattsburg, wherein Justice Dunwell rendered an opinion in which the court stated that it was proper and legal to place the questions relating to local option on the same ballot with the proposed constitutional amendments

"as the Election Law expressly provides that all such questions shall be submitted upon the same ballot." (32 Misc. 439.)

The proposition to change the site of the county jail of Cortland county should be placed upon the same ballot with the constitutional amendments and propositions to be submitted to the voters of the State at large, giving it on said ballot its proper number.

Dated September 21, 1916.

E. E. WOODBURY,

Attorney-General.

To COMMISSIONERS OF ELECTION, *Cortland, N. Y.*

VOTING MACHINES — ELECTION LAW, SECTIONS 392, 397, 408 AND 414.

Presidential electors may be voted for on the voting machine without placing the names of such electors in separate spaces thereon.

Voting machines cannot be legally used for the general ticket and a regular paper ballot for presidential electors at the same polling place.

Where a candidate is nominated by more than one party, his name must appear but once on the voting machine ballot.

INQUIRY

The State Superintendent of Elections, Hon. Frederick L. Marshall, has submitted for the opinion of the Attorney-General, the following questions pertaining to the use of voting machines at the coming presidential election:

1. Can the ballot for presidential electors be voted on voting machines without placing the names of the presidential electors thereon?
2. Is it legal to use the voting machine for the general ticket, amendments and questions submitted, and a separate paper ballot for presidential electors.
3. Can the name of a candidate nominated by more than one political party appear more than once on the face of the voting machine?

OPINION

A voting machine before it can be adopted for use at elections must be examined by the State Board of Voting Machine Commissioners, who report on its accuracy, efficiency and capacity to register the will of voters (§ 391, Election Law). Before such voting machines can be approved by the State Board of Voting Machine Commissioners the mechanism thereof must comply with all the requirements set forth in section 392 of the Election Law, which are in substance, that it must provide facilities for voting for such candidates as may be nominated; that it must permit an elector to vote for any person for any office whether or not nominated as a candidate by any party or organization and must permit voting in absolute secrecy; that it must be so constructed that an elector cannot vote for a candidate or on a proposition for whom or on which he is not lawfully entitled to vote; that it must prevent voting for more than one person for the same office, except where he is lawfully entitled to vote for more than one person

for that office. It must afford the voter an opportunity to vote for as many persons for an office as he is by law entitled to vote for, and no more.

Said section 392 of the Election Law further provides that the voting machine

“may also be provided with a separate ballot in each party column or row containing only the words ‘presidential electors’ preceded by the party name, and a vote for such ballot shall operate as a vote for all the candidates for such party for presidential electors, and shall be counted as such.”

Therefore it is evident that in placing the names of candidates for office on the voting machine, an exception was made as to the names of presidential electors, and it is therefore optional with the authorities having charge of the voting machines, as to whether they shall place thereon all the names of the presidential electors or simply the words “presidential electors” preceded by the party name.

The placing of the words “presidential electors” preceded by the party name, on the voting machine, provides a simple method whereby a voter may cast his ballot for all of the candidates nominated by any one party for presidential electors. This arrangement, however, in itself is not complete and does not give to the voter his right and privilege to vote for candidates of more than one party, or to vote for a person not a candidate of any party, and in order to provide the necessary facilities and protect the voter in his rights, the Legislature enacted section 408 of the Election Law applicable to voting machines, paragraph 2 of which provides that

“In voting for presidential electors a voter may vote an irregular ticket made up of the names of persons in nomination by different parties, or partially of names of persons so in nomination and partially of names of persons not in nomination, or wholly of names of persons not in nomination by any party. Such irregular ballot shall be deposited, written or affixed in or upon the receptacle or device provided on the machine for that purpose.”

This gives the voter in the election district wherein voting machines are used, an opportunity to vote what is commonly termed

a split ticket, by voting an irregular ballot as directed by said section 408 of the Election Law. This irregular ballot may be a paper ballot and deposited in a receptacle attached to and controlled by the machine, in such a manner as to prevent the voter from casting an irregular ballot and at the same time vote a straight ticket for presidential electors.

Section 414 of the Election Law provides that

“ Whenever irregular ballots have been voted, the inspector shall return all of such ballots in a properly secured sealed package endorsed ‘irregular ballots,’ and file such package with the original statement of canvass.”

Under the sections of the law hereinbefore cited a complete system or method has been provided to vote for candidates for presidential electors without placing the names of the candidates on the voting machine, and the requirements are that the machine shall contain the words “presidential electors preceded by the party name” and be provided with facilities for casting irregular ballots and a receptacle or device in or upon which to deposit, write or affix such irregular ballots. By this method the voter is given an opportunity to cast his vote for each candidate lawfully put in nomination or for whom he may desire to vote and for whom he has the right to vote, and sections 392, 408 and 414, taken together, preserve all the rights of the elector to vote for whomsoever he may desire without the necessity of placing in separate spaces on the voting machine the names of all the candidates nominated for that position.

The question has been raised as to whether or not it is legal to vote the general ticket, amendments and questions submitted on the voting machine and the candidates for presidential electors on a regular paper ballot. The Election Law of the State provides two methods of voting — by paper ballot and by the voting machine. There is no provision of the statute bearing specifically upon this question, that is, which says you shall or shall not use both methods of voting in an election district, but the requirements of a voting machine, as set forth in section 392 of the Election Law, are such as to permit a voter to vote for all candidates, amendments and questions submitted, and, in fact, to vote

for everything which is contained on the paper ballot. Therefore, it is for the authorities to select the method of voting, either by the machine or by paper ballot, and, having so selected, they cannot use both methods. If for any reason the voting machine cannot accommodate the whole ticket, then such machine should be discarded and the method of voting by paper ballots should be adopted for such election. The intent of the law is that only one method should be used in an election district, and there are several sections of the Election Law which substantiate this conclusion, namely:

Section 418 specifically states that ballot clerks shall not be elected or appointed for any district for which a voting machine shall have been adopted. It is there evident that if two systems of voting could be used at one polling place, or if it were discretionary with the authorities, there would be no law restricting the appointment of ballot clerks in election districts wherein voting machines are used.

Section 405 prescribes the use of a particular form of tally sheet for the voting machine, differing radically from the tally sheet used in canvassing the paper ballots, and section 413 gives specific directions as to the canvass of the vote and the proclamation of the result in election district where voting machines are used.

In view of the elimination of ballot clerks, the particular form of tally sheet and the specific directions for the canvass of the vote and the proclamation of the result, and the absence of any legislation tending to supply such districts with material to be used for the voting of a paper ballot, it does not seem logical or reasonable that it was the intent of the framers of the law to permit two methods of voting in the same election district; but, on the contrary, all the inferences to be drawn from a close and careful study of the Election Law lead to the conclusion that all the voting in any election district must be performed by one method, and it lies with the local authorities to decide which method they shall adopt.

A third question has arisen as to whether or not it is legal to place the name of a candidate more than once upon the voting machine ballot where he has been nominated or endorsed by two or more political parties.

Section 397 of the Election Law, among other things, provides that

"When the same person has been nominated for the same same office to be filled at an election by more than one party or independent body, all the provisions relating to the official ballot in this chapter shall apply and the voting machine shall be so adjusted that his name shall appear but once on the ballot."

It is, therefore, the intent of the law that the ballot as it appears on the face of the voting machine must be similar to the regular official paper ballot. The difficulty seems to appear where the candidate for Governor is nominated or endorsed by two or more political parties for the reason that the vote for Governor indicates the party strength and a voter has a right to have his party affiliation indicated by his vote for the candidate for Governor. This is accomplished by allotting to the candidate for Governor as many voting levers as there are parties which have nominated or endorsed him as their candidate; for example, if such candidate for Governor is nominated by four political parties, his title of office and name should be written on a space extending under four levers, and by each lever there should be placed the emblem of the party so nominating him, and the voter can operate the lever which indicates his party affiliation.

Dated October 3, 1916.

E. E. WOODBURY,
Attorney-General.

To STATE SUPERINTENDENT OF ELECTIONS, Albany, N. Y.

PENSION FOR VETERANS OF THE CIVIL WAR—CHAPTER 438, LAWS OF 1916.

Soldiers, sailors and marines of the Civil War entitled to a pension under the provisions of chapter 438, Laws of 1916, who are serving the State under employment or appointment by the State Hospital Commission in any capacity in which they were entitled to maintenance in addition to a stated salary at the time of their retirement, are permitted to have the fair value of such maintenance added to their stated salary for the purpose of fixing the amount of their pensions.

QUERY

How shall the amount of a pension to be paid to a retired veteran of the Civil War be ascertained in those cases where such

veteran was employed by the State at the time of his retirement at a stated salary; and in addition thereto was entitled to maintenance from the State?

OPINION

By chapter 438 of the Laws of 1916 a new section numbered 21-a was added to the Civil Service Law, which reads as follows:

“ § 21-a. Retiring veterans of the late civil war and granting them pensions. Every soldier, sailor or marine of the army or navy of the United States in the late civil war, honorably discharged from service, who shall have been employed for a continuous period of ten years or more in the civil service of the state of New York, and who shall have reached the age of seventy years, upon his own request, or if employed in manual labor, upon becoming incapacitated for performing manual labor, shall be retired from his employment by the state of New York, and thereafter and during his life, the state department or institution which employed him at the time of his retirement, shall pay to him, in the same manner that the salary or wages of his former position were customarily paid to him, an annual sum equal in amount to one-half of the salary or wages paid to him in the last year of his employment; provided, however, that the amount so to be paid to such retired veteran shall not exceed the sum of one thousand dollars per annum.”

It is provided by section 49 of the Insanity Law that the State Hospital Commission, with the approval in writing of the Governor, Secretary of State and Comptroller, shall fix the annual salaries of the resident officers of the State hospitals and that

“Food supplies shall be allowed to officers and employees and the families of the superintendent, first assistant physicians, directors of clinical psychiatry, pathologists and stewards. * * * Such families shall consist only of the wives and minor children of such officers. No other persons, except those regularly employed, shall be allowed rooms and maintenance, except at a rate to be fixed by the commission; such supplies shall be drawn from the supplies provided for gen-

eral hospital use. With the approval of the commission, officers or employees of state hospitals may be permitted to live outside of such hospitals, and shall receive such sums in lieu of the quarters or supplies furnished by the hospitals as may be equitable."

It is further provided by section 50 of the Insanity Law, in part, as follows:

"* * * When employees are allowed to board and lodge away from the hospital on account of lack of accommodations in the institution a uniform rate of not less than sixteen dollars per month shall be allowed in addition to the regular monthly wages, and this amount shall be appropriated at the rate of four dollars per month for each meal and four dollars per month for lodging."

It seems clear from a perusal of the above statutes that the Legislature intended that certain officers and employees at the State hospitals should be allowed their maintenance in addition to the salaries fixed by the State Hospital Commission, and by the above quotation from section 50 the amount to be paid by the State for such lodging and maintenance was fixed at the minimum rate of sixteen dollars per month in addition to the regular monthly wages in all cases where the employees who were entitled to maintenance boarded and lodged away from the hospital. It is fair to assume that the hospital commission fixed the salaries and wages of such officers and employees that were entitled to board and lodging with due regard to the value thereof, and it is also fair to assume that the wages and salaries of such employees who were entitled to such accommodations were fixed at a less sum than they might or otherwise would have been fixed at if they had not been entitled to the same. It would be inequitable and unfair to all such employees to deny consideration or allowance of their board and lodging in fixing the amount of their pensions. It is a part of their compensation for services rendered to the State. They would not be entitled to either except for services rendered.

Bouvier defines "wages" as follows: "Compensation given to a hired person for his or her services."

"Salary"—"A reward or recompense for services performed."

"Under a contract the employee may be entitled, as his compensation or as a part thereof, to food, clothing and lodging." 25 Cyc., 1050.

If the amount paid by the State to an employee for meals and lodging was so paid as a part of his compensation for services rendered the State, and I think it must be so considered and treated, then any allowance made in lieu of such board and lodging, when the employee boarded and lodged away from the hospital, or the fair value of his board and lodging when he had it at the institution, must be regarded as a part of his wages or salary and should be taken into consideration in fixing the amount of his pension just as much as though such employee had been paid that amount more in cash.

I do, therefore, advise you that in fixing the pensions of retired veterans of the late Civil War, pursuant to the provisions of chapter 438 of the Laws of 1916, due allowance should be made for the amount and value of the board and lodging of all those employees who were entitled to such board and lodging in addition to the money, salary or wages paid them. As a basis for ascertaining the amount of such pension there should be added to the regular cash salary or wages of each employee for the last year of his service the amount which has been allowed him, if anything, for board or lodging outside of the institution, as provided by section 50 of the Insanity Law, not less, however, than at the rate of sixteen dollars per month. One-half of the aggregate of such items would fix the amount of such pension. As to those employees who have been having board and lodging upon the grounds there should be added to their regular cash salary or wages an amount equal to that allowed to employees of the same grade who have been receiving board and lodging away from the institution; not less, however, than at the rate of sixteen dollars per month, and the pension fixed at one-half of the aggregate of the two items. If any cases should arise where no employee of equal grade has been receiving any sum for board or lodging outside of the institution, which could be used as a basis for the ascertainment of the value

for inside accommodation, then the amount should be fixed at the fair value of such inside accommodation, but not less than at the rate of sixteen dollars per month.

Dated October 9, 1916.

EGBURT E. WOODBURY,
Attorney-General.

To Hon. EUGENE M. TRAVIS, *Comptroller, Albany, N. Y.*

SECTIONS 2360, 2361, PENAL LAW; SECTION 140, BANKING LAW, AND SECTION 22, GENERAL CORPORATION LAW.

A business corporation organized for the purpose of advertising and increasing the sales of retail merchants and selling them printed matter is not authorized to issue checks, trading stamps or other evidence of debt which can be circulated as money, or to create or be interested in a fund for the purpose of receiving deposits, making discounts or issuing notes or other evidences of debt to be loaned or put into circulation as money.

INQUIRY

Under date of September 30th, the Banking Department asked for an opinion upon the legal questions involved in a plan of the Moulton Company, which is being incorporated under the laws of the State of New York, to issue what it terms "trading stamps" and the intention of the company is to issue checks or stamps to be given by retail merchants to their customers upon all cash purchases of one dollar or upwards.

It is proposed to have printed upon one side of such stamps the following words and figures:

(Obverse).

Deposit Value — Five Cents.	100
	—
	5

To the STATE BANK OF NEW YORK, New York
Series N 54326M
Dated, Nov. 15, 1915

Pay to the order of bearer
FIVE CENTS, according to the
conditions named on the back.

(Signed) MOULTON COMPANY (and address)

By JOHN Doe, Treas.

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and upon the other side the following:

(Reverse)

"DEPOSIT VALUE—FIVE CENTS.

" This check is good for five cents if deposited by the individual holder in bank in interest bearing account, with other similar checks having a deposit value of multiples of one dollar, and allowed to remain in deposit at interest for at least three months. The drawee is directed to honor at face when presented by any bank, banker or trust company. This check will not be good after three years from its date."

and the plan or scheme as authorized by the company is as follows:

" For the checks which have a deposit value of five cents, that is those which will be issued to retail cash customers who buy one dollar's worth of merchandise, the retailer will pay the Moulton company six cents; the customer gets what is worth five cents if deposited in interest account and allowed to remain three months and the Moulton company gets one cent, which represents its gross profit.

" Delivery of these checks in large quantities is made to the retail merchant as they are required, they being sent to a local bank in the retailer's town, and delivered over to the merchant on his paying cash therefor, as a deed would be delivered; the bank remitting the money paid, less a remitting fee of one-half of one per cent., with an adequate minimum fee. In remitting the bank remits, not direct to the Moulton Company, but to the Moulton Company's home bank, and the latter places every five cents of the six cents the retail merchant has paid, into the special account of the Moulton Company and the proceeds of every one cent of the six cents the merchant has paid, into the general account of the Moloton Company. The Moulton Company and its home bank agree that the sums deposited in the special account shall not be subject to any withdrawals, except in payment of the special checks, set forth in extenso above, and thus for every such check issued a sum is deposited in the special account sufficient to cover

it, which cannot be deleted from the account for any other purpose.

“a. The retail customer gets actual cash to the extent of 5 per cent. of his purchases, provided he leaves his deposits three months in the bank.

“b. The retail merchant gives something more attractive than trading stamps, in the same way he delivers trading stamps.

“c. The banks which collect and remit the payments by the merchant get a fee of one-half of one per cent. of what is remitted, minimum fee of 15 cents, and get new accounts opened.

“d. The home bank gets a big account.

“e. The Moulton Company get a gross profit of one per cent. of the price of merchandise sold at retail by merchants who enter the plan.”

and the inquiry is, does this plan violate any provision of the law?

OPINION

After a careful study of sections 2360 and 2361 of the Penal Law (formerly sections 384-p and 384-q of the Penal Code), which relate to the “issue and redemption of trading stamps and similar devices,” I am satisfied that the proposed plan of the Moulton Company does not violate either of such enactments as they have been construed or condemned as unconstitutional by various courts of the State. It seems to have been the intention of the Legislature of this State in the early stages of the legislation regulating the business, to destroy the trading stamp system except when such stamps were issued by a dealer or manufacturer and placed upon the goods sold or manufactured by him, and redeemable by such dealer or manufacturer in money or merchandise, and the first act, passed in 1887, was aimed at the prohibition of any gift, prize or premium as a reward to the purchaser of any article of food, but the Court of Appeals in *People v. Gillson*, 109 N. Y. 389, in a long, well considered opinion, declared the act unconstitutional.

The present section 2360 of the Penal Law was enacted by chapter 768 of the Laws of 1900 and became section 384-p and this was also held to be unconstitutional in *People ex rel. Madden v. Dycker*, Third Department, reported in 72 App. Div. 308. In that case the plan adopted and pursued by the parties was quite similar to that outlined by the Moulton Company, except in that case the trading stamps were redeemable in prizes of merchandise instead of money at a bank, and stress was laid upon such fact, and that the articles given as prizes were exhibited continuously and openly in the store occupied by the company which redeemed the stamps. The opinion was based largely upon the authority in *People v. Gillson*, *supra*, and at page 314 the Court says:

“The prohibitive part of section 384-p aims at the practice of issuing trading stamps that are to be redeemed by any person other than the merchant who distributes them, or the manufacturer of the packages of goods sold. Just what there is in the thing prohibited, differing from the thing expressly authorized, that makes it inimical to the public welfare and general safety does not appear. This record does not disclose any element of chance in the transaction. Even the possibility of some of the stamps never being offered for redemption is largely eliminated by there being no time or boundary limit to the collection of the stamps, and nothing in the arrangement preventing holders of small lots of stamps from combining with others to make a sufficient number for redemption. The transaction is not a species of lottery, and does not appeal to the gambling instinct. (*People v. Gillson*, 109 N. Y. 389; *Commonwealth v. Sisson*, 178 Mass. 578; *ex parte McKenna*, 126 Cal. 429; *State v. Dalton* [R. I.], 48 L. R. A. 775.)

“Section 384 is not included in the articles of the Penal Code (tit. 10, arts. 8, 9) relating either to ‘lotteries’ or ‘gaming.’ The mere fact that the stamps are redeemable by an agent of the principal or by a third person does not seem to affect the transaction so far as public safety and the general welfare of the community is concerned, or make it differ from the transaction declared to be within the prohibition of the Constitution by the *Gillson* case.”

and on page 317 the Court continues:

"The section of the code under which the relator was arrested is not a lawful exercise of the police power of the Legislature, and it is in violation of the provisions of the Constitution."

This last decision was rendered in 1902 and by chapter 657, Laws of 1904, section 384-q was added to the Penal Code (now section 2361, Penal Law). This section made it unlawful for anybody to sell or issue any trading, discount stamp, check, ticket, coupon or other similar device, unless there should be written or printed thereon the redeemable value thereof in lawful money of the United States in money value of not less than five cents in each lot, and stamps could be issued which were redeemable by any other person, firm or corporation other than the person or firm issuing the same without the consent of the person, firm or corporation issuing the same, made the person issuing the same liable for the face value of any such stamp or stamps, and made any person violating any provision of the act guilty of a misdemeanor.

This new section was before the Court of Appeals in the Appellate Division, Fourth Department (102 App. Div. 103), in case of People ex rel. Appel v. Zimmerman, and it was also held to be unconstitutional upon two grounds, i. e., first, upon the ground that it was an unreasonable and illegal interference with the liberty of a citizen in his pursuit of a livelihood, and, second, that it created a preferential class.

The legislation in all these cases was sought to be upheld upon the ground that they were reasonable regulations under the police power of the State and were therefore not repugnant to the Constitution and in People ex rel. Appel v. Zimmerman, *supra*, at page 111, the Court says:

"One or two propositions may be regarded as settled by authority. The police power while sufficiently comprehensive to meet most every exigency involving the public health, safety or morals, is subsidiary to the Constitution. When the purpose is plainly to subserve the public in some of the

respects named, the legislative enactment will be sustained for legislative control is supreme providing it keeps within the limitations of the Constitution.

"But it is also a landmark of our Constitution that the individual is permitted to engage in any lawful pursuit in a legitimate and honorable manner and he is above interference even by the Legislature if he keeps within the limits suggested."

The decision in the different States, where similar questions have been before State Courts and also in the Federal Courts, are not uniform or harmonious but the weight of opinion is against the constitutionality of such statutes, and in the light of the case in our own State I think it is quite clear that the plan proposed by the Moulton Company is not violative of any of the provisions of the Penal Law which are constitutional.

But there is another phase of this subject which presents itself for consideration and that is this:

It is provided by section 140 of the State Banking Law in part as follows:

"* * * No corporation, domestic or foreign, other than a national bank or a federal reserve bank, unless expressly authorized by the laws of this State, shall employ any part of its property, or be in any way interested in any fund which shall be employed for the purpose of receiving deposits, making discounts, or issuing notes or other evidences of debt to be loaned or put into circulation as money. All notes and other securities for the payment of any money or the delivery of any property, made or given to any such association, institution or company, or made or given to secure the payment of any money loaned or discounted by any corporation or its officers, contrary to the provisions of this section shall be void."

The trading stamps or checks, by whatever name they may be called are evidences of debt. They are partially in the form of checks and payable to the order of bearer according to the conditions named on the back; they circulate without endorsement:

they have series, numbers and dates; if deposited in sufficient numbers in interest bearing account and left three months or more they will draw interest; the drawee is directed to honor at face when presented by any bank, banker or trust company, the checks or stamps are redeemable after three years from their dates and they are thus put into circulation as money. The Moulton Company employs part of its funds for the purpose of meeting these obligations when they are presented to its home bank, and it is not expressly authorized so to do by the laws of this State.

It is further provided by section 22 of the General Corporation Law as follows:

“ § 22. PROHIBITION OF BANKING POWERS. No corporation, domestic or foreign, other than a corporation formed under or subject to the banking laws of this State or of the United States, except as permitted by such laws, shall by any implication or construction be deemed to possess the power of carrying on the business of discounting bills, notes or other evidences of debt, of receiving deposits, of buying and selling bills of exchange, or of issuing bills, notes or other evidences of debt for circulation as money, or of engaging in any other form of banking; * * *”

The Moulton Company is not formed under the Banking Laws, but it proposes to issue checks, stamps or evidences of debt for circulation as money, and it seems to me that they come perilously near, if not within, the absolute inhibition of the two statutes.

Former Attorney-General Carmody held in an opinion reported in Report of 1913, page 188, that a corporation organized under the Business Corporation Law for the purpose of conducting a real estate business which entered into contracts with its patrons to receive small installments of \$1 per week until the payments should amount to \$100 and then to secure lots and prepare plans for houses, and erect thereon houses for the respective parties, not to exceed \$3,000 in value, such customers to pay therefor in monthly payments of \$8.45 for each \$1,000 of the cost of the home, and in the event of the purchaser declining to accept the location and plans the company agreed to return to the purchaser the money which he had paid to the company with interest at 4½ per cent.,

was exercising the powers of a banking corporation in violation of the provisions of the above mentioned statutes.

There is still another objection to this proposed plan:

The purposes of the Moulton Company as stated in its certificate of incorporation are as follows:

“To conduct the business of advertising and increasing the sales of retail merchants and dealers throughout the State of New York, and the United States; of preparing and selling to such merchants and dealers printed matter for such purposes, and of doing all manner of things incident and necessary thereto.”

There is not a word in its proposed purposes of the issuance of any checks, trading stamps or other evidences of debt, nor is there anything indicating the forming or setting apart of a fund to meet such obligations, or in fact to do any of the things which it now proposes to do except by giving its purposes a strained and unwarrantable construction. The ostensible purposes of the corporation are to advertise the business of retail dealers and to increase their sales, preparing and selling printed matter, etc., but we find the real purpose is to issue checks, stamps or other evidences of debt and to sell them to merchants who in turn can place them in bank to be eventually paid out of a fund which has been set aside by the Moulton Company to meet such obligations. Unless the proposed plan is within the express provision of the charter or necessarily incidental thereto, it would be *ultra vires* and therefore unenforceable.

It is held in Chapman v. Lynch, 156 N. Y. 551, that a contract made by a business corporation for the manufacture of salt, to receive money in special account upon deposit, was *ultra vires*.

“It has been frequently stated that the validity of contracts of corporations is to be determined by comparing the contract made with the charter, and if upon such comparison it appears that the contract is neither expressly authorized, nor a necessary or reasonable incident to the exercise of the powers specifically granted, the contract is *ultra vires*.”

Bath Gas Light Co. v. Claffey, 151 N. Y. 29.

It cannot be claimed that the proposed plan is "expressly authorized" by the charter of the Moulton Company, but is it a "necessary or reasonable incident to the exercise of the powers specifically granted?" It may be claimed that by the use of the words "increasing the sales" and "selling printed matter" that authority was conferred upon the company to issue to such dealers checks or trading stamps to circulate through the banks, and as incidental to that work to keep a fund in bank to meet such obligations when they are presented, but it will require quite a stretch of the imagination to say that such transactions are "necessary or reasonable incidents" to the advertising business or the selling of printed matter to merchants.

I am forced to withhold my approval of this proposed plan of the Moulton Company, for the reasons hereinbefore stated, without regard to the question whether it is *ultra vires* or not, and I do therefore advise you that the proposed plan is violative of both the Banking Law and General Corporation Law.

Dated, October 14, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. EUGENE LAMB RICHARDS, *Superintendent of Banks,*
Albany, N. Y.

HIGHWAY LAW—ACQUISITION BY BOARD OF SUPERVISORS OF INTEREST IN LANDS LESS THAN THE FEE—ACQUISITION OF EASEMENT IN LANDS FOR DEPOSIT OF SPOIL.

A board of supervisors of a county in acquiring lands pursuant to sections 148-155 of the Highway Law (chapter 30 of the Laws of 1909, as amended) may acquire an easement in lands to be put to the use of spoil area.

STATEMENT OF FACTS

State Highway No. 5498, Orange county, extends along the easterly and southerly sides of Storm King Mountain and is commonly known as the Storm King Road. The major portion of this highway is over new rights of way, land sufficient for the location of the highway having been acquired on Storm King Mountain over certain private property. At points along the newly acquired right of way the slope of the mountain is steep. At these

points the roadways is to be cut out of the solid rock. To progress the work within reasonable expense blasting operations are necessary. Owing to the character of the rock as well as the precipitous slope of the mountain it is impossible to carry on the work incidental to this construction without causing loose stone to break away and be precipitated down the mountain side upon private property.

INQUIRY

My opinion is requested by the Commissioner of Highways whether under the statutes now prevailing an easement for spoil purposes can be acquired during the period of the construction of State Highway No. 5498 in the property upon which the stones and other debris is precipitated.

OPINION

By sections 148-155 of the Highway Law (Laws of 1905, chapter 30, as amended), the Legislature has prescribed a method of taking private property for a public use, viz.: for the construction of State or county highways and uses in connection with such construction.

Section 148 provides as follows:

“ACQUISITION OF LANDS FOR RIGHT OF WAY AND OTHER PURPOSES. If a State or county highway, proposed to be constructed or improved as provided in this article, shall deviate from the line of a highway already existing, the Board of Supervisors of the county where such highway is located, shall acquire land for the requisite right of way prior to the actual commencement of the work of construction. The Board of Supervisors may also acquire lands for the purpose of obtaining gravel, stone or other material, when required for the construction, improvement or maintenance of highways or for spoil banks together with a right of way to such spoil banks and to any bed, pit, quarry, or other place where such gravel, stone or other material may be located.”

Referring to the provisions of the section quoted above “the Board of Supervisors may also acquire lands for * * * spoil banks, together with a right of way to such spoil banks

* * *, it will be noted that the statute does not provide in particular terms for the acquisition of the fee to the land.

The courts have repeatedly held that in the taking of private property for public use the statutes conferring that power are to be strictly construed and where the estate to be taken is not defined, only such an estate or interest will vest as is necessary to accomplish the purpose in view, and where an easement is sufficient no greater estate can be taken.

In Hudson and Manhattan R. R. Co. v. Wendell, 193 N. Y. 166, 176, Judge Chase writing for the Court of Appeals, quoting from authorities cited upon this question, states as follows:

"In the absence of constitutional restrictions the Legislature in the exercise of its power to authorize the taking of private property for public use is the exclusive judge of the extent, degree and quality of interest which are proper to be taken. It rests wholly in the wisdom of the Legislature to say what estate shall be taken. In construing the statutes, however, it will not be implied that a greater interest or estate can be taken than is absolutely necessary to satisfy its language and object or than the Constitution allows. And although a taking of the fee may be authorized where necessary in the absence of express words the statute will not be so construed where its purpose will be satisfied by the taking of an easement. * * * In construing a statute authorizing the taking of private property for public use, it will not be implied that a greater interest or estate can be taken than is absolutely necessary to satisfy the language and object of the act, and where the Constitution and statute are both silent on the subject nothing more than an easement can be taken."

See also The Brooklyn Park Commissioner v. Armstrong, 45 N. Y. 234, 240; The Washington Cemetery v. The Prospect Park and Coney Island R. R. Co., 68 N. Y. 591, 594; Sweet v. Buffalo, N. Y. & Phil. Ry. Co., 79 N. Y. 293, 299.

From the inquiry by the Commissioner of Highways it is apparent that the acquisition of an interest in extra land is desired to provide for spoil area upon which the contractor will be permitted to deposit spoil during actual construction work. It is my opinion

that such a use of land is within the provisions of section 148 of the Highway Law quoted above and to borrow from the language of Judge Chase in *Hudson and Manhattan R. R. Co. v. Wendell, supra*, "although a taking of the fee may be authorized where necessary in the absence of express words, the statute will not be so construed where its purpose will be satisfied by the taking of an easement."

I am, therefore, of the opinion that under the statutes the Board of Supervisors of Orange county are authorized to proceed to acquire an easement in lands adjoining the right of way acquired for the construction of State Highway No. 5498 for the purpose of depositing thereupon spoil resulting from such construction.

Dated, October 19, 1916.

E. E. WOODBURY,

Attorney-General.

To Hon. EDWIN DUFFEY, *Commissioner of Highways of the State of New York, Albany, N. Y.*

NATURALIZATION — SECTIONS 4351, 4352, 4353 AND 4354 OF THE UNITED STATES COMPILED STATUTES (1913); SECTION 148, JUDICIARY LAW; SUB-DIVISION 4 OF SECTION 3343 OF THE CODE OF CIVIL PROCEDURE.

The county clerk of Hamilton county is the clerk of the Supreme Court for all actions, special proceedings and acts to be done in or by authority of the Supreme Court within or for said county.

INQUIRY

Where should the declaration of intention and petition for naturalization of aliens residing in Hamilton county be filed.

OPINION

It is provided by section 4351 of the United States Compiled Statutes (1913):

"All courts of record in any State or territory now existing, or which may hereafter be created, having a seal, a clerk and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited,"

shall have jurisdiction to naturalize aliens as citizens of the United States. It is further provided by such section:

“ That the naturalization jurisdiction of all courts herein specified, State, Territorial and Federal, shall extend only to aliens resident within the respective judicial districts of such courts.”

Section 4352 reads in part as follows:

“ An alien may be admitted to become a citizen of the United States in the manner following and not otherwise:

“ First. He shall declare an oath before the *clerk of any court authorized by this act to naturalize aliens, or his authorized deputy, in the district in which such alien resides*, two years at least prior to his admission. * * *

“ Second. Not less than two years nor more than seven years after he has made such declaration of intention he shall make and file in duplicate a petition in writing, signed by the applicant in his own handwriting and duly verified, in which petition such applicant shall state his full name, his place of residence (by street and number, if possible), * * * the time when and the place and name of the court where he declared his intention to become a citizen of the United States. * * * The petition shall also be verified by the affidavits of at least two credible witnesses, who are citizens of the United States, and who shall state in their affidavits that they have personally known the applicant to be a resident of the United States for a period of at least five years continuously, and of the State, territory or district in which the application is made for a period of at least one year immediately preceding the date of the filing of his petition. * * * At the time of filing his petition there shall be filed with the clerk of the court * * * the declaration of intention of such petitioner, which certificate and declaration shall be attached to and made a part of said petition.”

Subdivisions 3 and 4 of the same section provides the method by which he shall appear in open court and take the oath of allegiance, and prove that he has resided continuously within the

United States at least, five years, and within the State or territory where such court is at the time held one year at least, and that in addition to his oath he must have the testimony of at least two witnesses, citizens of the United States, as to the fact of residence, moral character, etc.

Section 4353 provides that the *clerk of the court* shall immediately after filing the petition, give notice thereof by posting in his office certain facts including the residence of the alien, the date of final hearing upon his petition as nearly as may be, and the names of his witnesses.

Section 4354 provides that the petitions for naturalization may be made and filed during a term of a court or in vacation of a court.

These several provisions seem to clearly contemplate that the applicant shall make and file his declaration of intention and petition and affidavits with the clerks of the courts as follows: If the application is made through the United States Circuit or District Court as provided by section 4351, the papers should be filed with the clerk of such Circuit or District Court wherein the applicant resides. If made in the State Courts then to the clerk of the court wherein the applicant resides.

By subdivision 4 of section 3343 of the Code of Civil Procedure, it is provided as follows:

“The word, ‘clerk,’ signifies the clerk of the court wherein the action or special proceeding is brought, or wherein, or by whose authority, the act is to be done, which is referred to in the provision in which it is used. If the action or special proceeding is brought, or the act is to be done, in or by the authority of the Supreme Court, it signifies the clerk of the county wherein the action or special proceeding is triable, or the act is to be done.”

It is also provided in section 148 of the Judiciary Law that “Fulton and Hamilton counties shall be deemed one county,” for the purpose of holding trial and special terms of the Supreme Court therein. It will be noted that nothing is said as to where the courts may be held but it follows that wherever the court is held, whether in Fulton or Hamilton, the county clerks of the respective

counties become the clerks of the court by force of section 3343 of the code for all actions, proceedings, "and acts to be done" in their respective counties, and if an alien resides in Hamilton county and wishes to file a declaration of intention to become a citizen through the State Supreme Court, he would be compelled to file it with the clerk of Hamilton county, as that is the place where the "act is to be done," and his duplicate petitions and affidavits should also be filed there. When the matter is taken up for a hearing before the court, whether it is held in Fulton or Hamilton county, the papers or a sufficient certificate should be presented to the court (*In re Bodek*, 63 Fed. Rep. 815), and upon final disposition of the application, all papers and orders should be returned to the county clerk of Hamilton county, as he is the "clerk of the court" in all actions, proceedings and acts to be done within that county. *In re Fronascone*, 99 Fed. Rep. 48, it was held:

"The essential fact of the declaration is always decisively shown by production of the record or by due certification thereof."

As long as Fulton and Hamilton counties are grouped together as one county for Supreme Court purposes, it follows that a suitor of either county is entitled to all the rights and privileges in any court held in either county.

The applicant is required to appear at the court with his witnesses and it becomes a court proceeding. While the clerk of Fulton county may be in attendance and do the clerical work, the hearing is a judicial determination and the applicant, being a resident and suitor from Hamilton, it becomes the duty of the court to order and direct that all papers used and testimony taken, be filed, and all orders and decisions made in such proceedings be entered in the county clerk's office of the county of Hamilton, where the applicant resides, as provided by the General Rules of Practice. Perhaps this would not be necessary inasmuch as Fulton and Hamilton counties are united as one county for the purpose of holding terms of the Supreme Court therein, but in any event, the county clerk of Hamilton county is the clerk of the Supreme Court for all naturalization of residents of that county. The

declaration of intention, the petition and affidavits, oath of allegiance and all papers connected with his naturalization, should be filed in that county, and all orders relating to the admission of residents of that county to citizenship should be entered in that county.

I am informed by the clerk of Fulton county that in the one case of naturalization from Hamilton county during his official career as county clerk, the declaration was entered in that county, but there is no information whether it was entered in Fulton county by order of the court, or by direction of the county clerk acting without order. With all due regard to the order of the court, if the naturalization papers were entered in Fulton county by its order, the fact remains that a resident of Hamilton county is a suitor from that county and Hamilton county has a full set of county officers including a clerk with a seal, and whether the court was held in Fulton or Hamilton county, the clerk of Hamilton county was the clerk of the court for all actions, proceedings and legal acts to be done in such county.

I am therefore, of the opinion that the declaration of intention, the petition and affidavits, oath of allegiance and all other papers relating to the naturalization of residents of Hamilton county, should be filed and orders made should be entered in the county clerk's office of the county of Hamilton and for all such purposes he is the clerk of the Supreme Court for that county.

Dated, October 31, 1916.

E. E. WOODBURY,
Attorney-General.

To C. O. C. COWLEY, *Chief Naturalization Examiner.*

ASSESSMENT INSURANCE — LIABILITIES OF COMPANIES FOR ASSESSMENTS PAID IN ADVANCE.

The amounts paid in advance by holders of co-operative insurance policies, either quarterly or annually, create a liability against the company to the amount of the unearned assessments, and such companies should hold all such unearned premiums in reserve until the renewal periods have expired.

INQUIRY

Should the advance payments made by policyholders of an assessment insurance company be charged against such company as

liabilities upon a statement of its condition by an examiner of the Insurance Department?

OPINION

The New York Casualty Company of Buffalo is a co-operative health and accident association operating under the provisions of Article VI of the Insurance Law of the State of New York. The company transacts the business of health and accident insurance on the assessment plan, and operates in New York State only.

Four different policies, known as the Regular, the New York Casualty Special, the Model and the Housewife policy, are issued by the company.

The policy fee on the Model policy is \$2, and on the others \$3 each. The monthly premiums run from \$1 up, and the benefits are graded according to occupation. Specific indemnities are provided, the payment for the loss of both hands, feet or eyes being the same as the death indemnity, and for the loss of one hand and one foot, one-half, and for the loss of one eye, one-third the death indemnity.

The call for January, 1916, was made on December 21, 1915, and the total amount received by the company and in the course of collection, was allowed by the examiner as a credit to the company in the statement of its assets, and all the collections made or in the course of collection in advance of the December call upon quarterly and annual assessments was charged as a liability as follows:

“Quarterly and annual assessments paid, or in course of collection in advance of December call, \$1,877.”

The report of the examiner shows that the liabilities of the company exceed its admitted assets by the sum of \$1,675.81 and if the above amount of \$1,877, advance payments, had not been charged against the company as a liability, there would have appeared to remain a small balance of assets over liabilities at the date of the report.

Section 205 of the Insurance Law reads in part as follows:

“Every such casualty association or society shall maintain a reserve or emergency fund of * * * two dollars for

each five thousand dollars of insurance in force * * * and thereafter five per cent of the amount realized on each periodical call shall be set apart and added thereto, unless the same be already accumulated, until such fund shall be equal to two dollars on each five thousand dollars of insurance in force. In case such reserve or emergency fund or any portion thereof shall have been used by any such corporation or society for the purpose for which the same was created or maintained, the amount so used shall be made up and restored to said fund within six months thereafter."

By this provision every casualty company is required to keep permanently on hand a certain amount as a reserve fund, and the statute directs just how it shall be accumulated and if any part of it is used up it must be restored. It is not a temporary fund to be made up by advance payments made by policyholders, which may be required to pay losses at any time and thus depleted or completely used up.

If the amounts paid in advance are not reserved for the purposes for which they were intended, i. e., to continue the policies upon which they were paid, in force until the end of the periods for which such advance payments were made, but can be diverted to other uses, the policyholder is deprived of some of the security for which the advances were made. The company agrees with every policyholder who pays for three months or a year in advance that his life and health shall be insured for such periods without further payments from him (unless the company shall see fit to cancel the policy before that time). If such advance payments are used for some other purpose, instead of being reserved to meet expenses and losses which will occur during such periods, then such policyholders' contracts will be impaired and jeopardized to the extent of such diversion of funds.

It must be borne in mind that this is an assessment company without capital and without funds except such as are collected from time to time to provide for losses and current expenses and a small reserve fund.

Article VI authorizes the assessment upon the members to meet the claims that are incurred from time to time for expenses and

losses, but does not seem to contemplate the collection of premiums in advance. The Insurance Department has approved of this form of insurance, and the question now arises as to how such advance premiums should be listed in a statement of its accounts, if at all.

All three kinds of the policies issued by the New York Casualty Company of Buffalo, provide for certain payments either monthly, quarterly or annually and it is claimed by the company that policyholders who pay quarterly or annually in advance secure additional advantages either in the way of increase of benefits or reduction of premiums. This seems to be so, but I am unable to see how it changes the liability of the company to such policyholders. If the company has the right to appropriate a portion or the whole of such advance premiums to other purposes, the funds which have been paid in for the support of those policies have been depleted by just the amount of such appropriations, and as the expenses and losses accrue, the advance payments which have been made are used up before the renewal periods for which the policyholders have paid, have expired and either a deficit is found to exist or sufficient funds are not available to meet current obligations and resort must be made to additional assessments. Each form of policy contains this provision:

“This policy is issued subject to the payment of such premiums as are required by the company should it be found that the regular premiums are insufficient.”

In the light of this policy provision, it would appear that it is of great importance to every policyholder who has paid in advance that the company should be compelled to keep intact all unearned premiums until they have been actually earned by the policy.

We further find that each policy contains the following provision:

“The company may cancel this policy at any time without prejudice to any claim arising on account of disability commencing prior to the date on which the cancellation takes effect by a written notice of cancellation delivered to or mailed the assured at his last address, as shown by the records of the company, with the company's check for the unearned portion, if any, of the premiums paid, which check shall be sufficient tender.”

It will have to be conceded by all parties that the contractual relations of the parties are fixed and determined by the policy, and we find by the above quoted paragraph that the company has reserved the right to cancel each policy upon sending to the assured a written notice of cancellation and the company's check for the unearned portion of the premium.

It is difficult to see upon what reasonable theory the company can reserve the right to cancel a policy upon mere caprice or otherwise by simply giving notice of the cancellation thereof and sending a check for the unearned premium, and still object to holding in reserve such unearned premiums as liabilities. When the company accepts premiums upon such conditions it certainly should not be allowed to use them and still be permitted to cancel the policies without adequate protection to such policyholders. With an assessment association which is required to maintain but a small reserve fund, it is of great importance to those policyholders who have paid their assessments in advance, that it should be required to hold all unearned premiums until they have been applied in *pro rata* order with all other policyholders.

It is claimed by the company that the above quoted clause from the policy was adopted from a stock company policy, and only amounts to "a reserved right of the company to be exercised or not at its pleasure — the policyholder cannot force its exercise, and unless and until the company chooses to exercise the right, no liability can arise against the company thereunder."

It is provided by the Insurance Law that every policy of insurance shall contain the entire contract between the parties, and each policy reserves the right to the company to cancel the same at any time. No reasons are required to be alleged why the cancellation is made. If cancellations are made, then the policyholder is entitled to a return of all unearned premiums. The attorney for the company concedes, and the language is unmistakable, that when cancellations are made, a liability of the company arises immediately to the policyholder, and it is an assessment company without stockholders and without invested capital or reserve fund except the small reserve fund required by section 205 of the Insurance Law. If the advance payments made by the policyholders have been previously used up, there would be no protection for the

policyholder, and while there is no specific statutory provision requiring all unearned premiums to be held in reserve until they have been applied *pro rata* with other policyholders, or returned to them upon cancellation of their policies, the company's liability cannot be denied. The liability exists, and it is the duty of the Insurance Department to see that the rights and interests of the policyholders are safeguarded.

It is also claimed by the company that it has not exercised the right of cancellation of any of the quarterly or annual policies and therefore no liability has arisen in favor of such policyholders. The fact remains, that the company has reserved the right to cancel such policies at any time and until each quarterly or annual advance payment has been earned by the policy, the company can create a liability against itself by the exercise of its right of cancellation. With this right existing, can it be justly claimed by the company that it should not be required to hold the funds which are necessary to meet its obligations, and which may only arise out of its own exercise of power, until the periods have elapsed for which advance payment were made, or in other words, until the premiums have been fully earned? As long as the company has reserved to itself the right to cancel any number of policies it may elect to cancel, it should be compelled to keep a sufficient fund on hand to meet its obligations which may only arise out of the exercise of its own option.

This is not a company where assessments are made each month to meet all losses which have accrued up to the date of such assessments, but assessments are made at a fixed rate, by the month, quarterly and annually in advance, and if these are found insufficient, then additional assessments can be made. If these advance premiums are not reserved by the company to be applied *pro rata* with all other policyholders to meet expenses and losses as they accrue, then all policyholders who have paid in advance are subject to conditions over which they have no control; their money used up and expended long before the renewal period has expired; and they are subjected to additional assessments without any adequate protection.

As long as the company has adopted the same or a similar form to that used by stock companies in regard to the return of unearned

premiums in the event of cancellation, I can see no reason why it should not be required to protect its policyholders by a reserve amounting to the unearned portions of such assessments in the same manner as such stock companies are compelled to do, whether specific provision is made in the statute for such reserve or not.

I am informed that it is the practice of the Insurance Department to compute the unearned premium on a monthly basis, and that the assessments paid for more than a month in advance are the only ones which enter into the computation for the purpose of ascertaining the amount of the unearned premiums. This appears to be fair to both the company and the policyholder.

It is claimed by the attorney for the company that if the action adopted by the Insurance Department in this case is insisted upon it will be a reversal of its practice for many years back in relation to assessment companies and that the department should be bound by its action in the past upon the principle of *stare decisis*. This is denied by the department and it claims that it has always charged assessment companies with assessments paid in advance, but whatever has been the practice in the past, it should not be continued if it does not properly protect and safeguard the interests of the policyholders as well as those of the company. I also think it would be the duty of the Insurance Department to require the company to hold in reserve the *pro rata* shares of all unearned assessments if there were no cancellation clause in the policies.

The fact that those policyholders who pay in advance, obtain some additional benefits on account of such advance payments, does not appeal to me as a reason why the department should ignore the liability of the company to such policyholders.

I am, therefore, of the opinion that the *pro rata* portion of all assessments paid in advance upon the policies issued by the New York Casualty Company, both quarterly and annually, should be listed and charged against the company as liabilities.

Dated, November 29, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. JESSE S. PHILIPS, *Superintendent of Insurance, Albany,*
N. Y.

EDUCATION LAW, SECTION 389, SUBDIVISION 2 — INCREASE OF SALARY OF DISTRICT SUPERINTENDENT OF SCHOOLS DURING HIS TERM OF OFFICE.

An increase of salary under subdivision 2 of section 389 of the Education Law may be granted to take effect during the term of office of the district superintendent affected thereby.

INQUIRY

The State Commissioner of Education has requested that an opinion be rendered as to whether or not the increase of salary under subdivision 2 of section 389 of the Education Law may take effect during the term of office of the district superintendent affected thereby.

OPINION

The Education Law, section 389, as amended by chapter 607 of the Laws of 1910, provides as follows:

“ § 389. SALARY OF DISTRICT SUPERINTENDENT:

“ 1. Each district superintendent shall receive an annual salary from the State of twelve hundred dollars payable monthly by the Commissioner of Education from moneys appropriated therefor.

“ 2. The supervisors of the towns composing any supervisory district may by adopting a resolution by a majority vote increase the salary to be paid by such district to its district superintendent. Such supervisors must thereupon file with the clerk of the Board of Supervisors a certificate showing the amount of such increase. The Board of Supervisors of each county shall levy such amount annually by tax on the towns composing such supervisory district within the county.”

I do not find any constitutional provision with reference to the compensation of such officers or which prohibits such an increase of salary in the case of such officers during their term of office.

The Constitution of this State prohibits the giving of extra compensation to officers (article 3, section 28), the passage of local bills by the Legislature increasing or diminishing certain compensations (article 3, section 18) preventing the increase of compensation of certain designated State officers during the term for which they are elected (article 5, section 1), and forbids that

salaries of constitutional officers named in the Constitution be increased or diminished during their terms of office (article 10, section 9).

None of these provisions mentioned has any application here.

It has been well settled in this State, that the prospective salary of a public office may be increased by the Legislature except in so far as expressly forbidden by the Constitution and that this doctrine applies equally to the delegated authority of a local board. (*Connor v. New York*, 5 N. Y. 285; *Dorr v. City of Troy*, 19 Hun, 224; *Matter of the Mayor*, 33 App. Div. 365; *Truesdale v. City of Rochester*, 33 Hun, 574.)

It is clear that no restriction has been placed upon the supervisors of the town composing any supervisory district under section 389 of the Education Law relative to a change in compensation during the term of office and I find no other statutory provision applicable to this office which would interfere with the granting of an increase to take effect during the term of office of the district superintendent affected thereby.

The restrictions contained in subdivision 5 of section 12 of the County Law are not applicable to this office. That subdivision contains a provision that "the salary or compensation or an officer or employee elected or appointed for a definite term shall not be increased or diminished during such term." This subdivision is one of the subdivisions prescribing the general powers of the Board of Supervisors and applies only to officers recognized as county officers, the appointment or election of whom is provided for either in the County Law or by regulation of the Board of Supervisors. The district superintendents perform duties under the regulation and control of the State Department of Education. Their duties relate solely to the conduct of a State system of schools. Their salaries are paid by the State except that an increase may be granted to be paid pursuant to this section by the district affected. They are not county officers within the meaning of the County Law provision.

Moreover, this proposed increase is not granted by the Board of Supervisors. Subdivision 2 of section 389 confers the power of increase upon the supervisors of the several towns comprising the supervisory district and the tax levied to pay for this increase

is levied upon the property of the towns composing such district within the county. There is nothing to indicate that the statute contemplated that this resolution should be passed in a regular meeting of the board. The supervisors outside of the supervisory district are not interested. The statute commands the Board of Supervisors upon the filing of a certificate showing the amount of such increase to levy such amount by tax on the towns composing such supervisory district and it has been held that a peremptory writ of mandamus may be granted directing the board to levy such tax upon the filing of such a certificate. (People ex rel. Wingate v. Board of Supervisors, 79 Misc. 641.)

It is, therefore, my opinion that such an increase of salary may be granted to take effect during the term of office of the district superintendent affected thereby and that the provision of subdivision 5 of section 12 of the County Law has no application.

Dated, December 2nd, 1916.

E. E. WOODBURY,

Attorney-General.

GRADE CROSSINGS — SECTION 94, RAILROAD LAW; SECTION 141 OF THE HIGHWAY LAW, AS AMENDED BY CHAPTER 83 OF THE LAWS OF 1912.

The town in which a grade crossing is eliminated upon a county highway which was constructed prior to the enactment of chapter 83 of the Laws of 1912, is still liable for 15 per cent of the expenses of such elimination; but towns are no longer liable for any portion of the expenses connected with such eliminations upon county highways which have been constructed since such act took effect.

INQUIRY

Are the towns still liable to contribute towards the expense of eliminating railroad grade crossings upon county highways since the enactment of chapter 83 of the Laws of 1912?

OPINION

On the 5th day of May, 1912, the Public Service Commission, Second District, was petitioned for the alteration in the manner in which the highway known as the Voorheesville-New Salem County Highway, No. 984, in the town of New Scotland, Albany county, crossed the tracks of the West Shore Railroad Company

(leased and operated by the New York Central and Hudson River Railroad Company), pursuant to the provisions of section 91 of the Railroad Law.

The petition was granted on the 26th day of August, 1913, and the work was then proceeded with and finally completed in November, 1915. The entire cost amounted to the sum of \$36,618.36, and half of such expense was paid on the basis of the State paying 50 per cent, the county 35 per cent and town of New Scotland 15 per cent thereof; the railroad company paying the other one-half of the cost.

County Highway No. 948 was constructed prior to the 2nd day of April, 1912, but the petition for, and all the work connected with the elimination of such grade crossing, was subsequent thereto.

It is now claimed by the Board of Supervisors of Albany county, that it is entitled to a refund from the State of the sum of \$1,373.19, representing fifteen per cent of one-half of the actual cost of such elimination.

It is provided by section 94 of the Railroad Law, in part as follows:

“ Whenever under the provisions of sections ninety and ninety-one of this chapter a highway is constructed across an existing railroad and is a part of a State or county highway constructed or improved as provided in the Highway Law, one-half of the expense of making such crossing above or below grade or changing or rebuilding the existing structure by which such crossing is made, shall be paid by the railroad corporation, and the remaining one-half of such expense shall be paid by the State in the case of a State highway, and jointly by the State, county and town in the case of a county highway, in the same proportion and in the same manner as the cost of construction or improvement of such State or county highway is paid.”

Since April 2, 1912, the above section has been twice amended. The first amendment, chapter 378 of the Laws of 1914, made a change in the subdivision above quoted, and the amendment made by chapter 240 of the Laws of 1915 was a general amendment of

the section, but made no change in the above quoted portion of such section. Neither amendment made any change in the method of apportioning the expense for an elimination of a grade crossing.

Prior to April 2, 1912, the expense of constructing a county highway was borne by the State, county and town in the following manner: The State paid 50 per cent, the county 35 per cent and the town 15 per cent. By chapter 83 of the Laws of 1912, which took effect April 2, 1912, it was provided that thereafter the cost of construction of such county highways should be borne jointly by the State and county, the State to pay 65 per cent and the county 35 per cent, and the town was eliminated from further liability to pay any portion of such costs. z

If the provisions of the railroad law relating to the town's liability to contribute to the expense of altering railroad crossings upon county highways which were constructed under the law as it stood prior to April 2, 1912, were changed by the amendment of the Highway Law above referred to, there is conflict and repugnancy between the two statutes, but it would seem that if the Legislature intended to change the Railroad Law with reference to the apportionment of the expenses for the elimination of grade crossings upon such county highways which were constructed before, as well as those constructed after the act of 1912, we would find some amendment of the Railroad Law which would clearly indicate such intent and not leave the change to inference or implication which is worked out through an amendment to an entirely different statute. There has been no change in the phraseology of section 94 of the Railroad Law so far as it provides for contribution by the towns. It provides that the expense of elimination of crossings of the character of the one at Voorheesville is to be paid for jointly by the State, county and *town*, "in the same proportion and in the same manner as the cost of the construction or improvement of such State or county highway is paid," but it is claimed that this provision so far as it applies to a town was wholly repealed by implication by the enactment of chapter 83 of the Laws of 1912.

Repeals by implication are not favored by the courts and will not be declared except upon the clearest manifestation of such an intent on the part of the Legislature.

- Grimmer v. Tenement House Dept., 204 N. Y. 370.
City of New York v. Trustees, 85 A. D. 355.
Matter of Tiffany, 179 N. Y. 455.
People v. Ward, 91 N. Y. 616.

These two statutes relate entirely to different classes of work, one to the construction of State and county highways and the other to the alteration and elimination of railroad crossings upon such highways. The inconsistency which is claimed to exist arises out of the fact that the railroad law after providing that one-half the expenses of elimination shall be State, county and town charges, directs that it shall be paid in the same proportion by the respective municipalities as provided by the Highway Law for the construction of such highways, and when we turn to the Highway Law, as amended in 1912, we find that no part of the expense can be charged upon the town since April 2nd of that year.

"If by any fair construction, whether strict or liberal, a reasonable field of operation can be found for both acts, that construction should be adopted." (Id. Matter of Tiffany, 457.) It seems to me by construing the Railroad Law as still applicable to the distribution of the expenses for such eliminations as they were apportioned before the enactment of chapter 83 of the Laws of 1912, upon all county highways which were constructed under the law as it stood prior to that date, and that the towns are only eliminated from contribution for such expenses on all roads constructed under the statute as it has existed since that date, that effect can be given to both statutes and both can be upheld. If they are so repugnant that both cannot be sustained, then the provisions of chapter 83 so far as it eliminates the town from contribution for such work, will have to be regarded as inoperative, since the enactment of chapter 378 of the Laws of 1914, for section 94 of the Railroad Law has been twice amended as hereinbefore stated, since chapter 83 was passed and by both amendments the liability of the town has been continued. It is equally well settled that where repugnancy exists in different statutes, to such an extent that they cannot be reconciled, then the later or more recent statute shall prevail over the former, as the later law is presumed to express the last intention of the Legislature. I do not think, how-

ever, that it is necessary that either act should be construed as repealed, but that both should be given effect in their respective fields of operation.

Again, I am informed that since the enactment of chapter 83 of the Laws of 1912, both the Highway Department and the Public Service Commission have treated the provisions of the Railroad Law with reference to the distribution of the expenses of elimination of railroad grade crossings, as still in force as to the town's liability upon all roads constructed under the law as it existed before the 2nd day of April, 1912, and have, on several occasions, made distribution of such expenses upon county highways constructed under the law as it stood prior to such date, in precisely the same way they did before the passage of chapter 83. While the interpretation of those two commissions is not absolutely controlling, still their action is entitled to great weight upon a subject involving doubt as to the proper construction to be placed upon these statutes.

"The practical construction of a statute by those for whom the law was enacted, or by public officers whose duty it is to enforce it, acquiesced in by all for a long period of time, is of great importance in its interpretation in a case of serious ambiguity."

Grimmer v. Tenement House Dept., 205 N. Y. 549,
and cases cited.

People ex rel. Werner v. Prendergast, 206 N. Y. 411.
Easton v. Pickersgill et al, 95 N. Y. 310.

It was held by Attorney-General Carmody in an opinion under date of April 25, 1912 (Report of 1912, page 230), that a town would remain liable for its proportion of the cost of construction of all county highways where the liability had become fixed prior to the 2nd day of April, 1912, and the same ruling was again made by Mr. Carmody in an opinion in report of 1912, at page 234. It was held in the latter opinion that the act of 1912 was not intended to act retroactively and that in all cases where plans and appropriations had been made before April 2, 1912, for the con-

struction of county highways, the cost of such construction should be apportioned between the State, county and town in accordance with the provisions of section 141 of the Highway Law, as it stood prior to the enactment thereof by chapter 83. I am in full accord with both of such opinions, but neither related to the distribution of expenses connected with the elimination of grade crossings upon a county highway.

By leaving the word "town" in section 94 of the Railroad Law in the two amendments which have been made thereto since the enactment of the 1912 law, the intent of the Legislature to continue the town's liability for expenses connected with the elimination of grade crossings upon all county highways which were constructed under the law as it existed prior to April 2, 1912, is clearly indicated. If it were intended that the State and county alone should pay the one-half of the expenses of all eliminations after the passage of chapter 83, then the word "towns" contained therein is not only useless but confusing. On the contrary, if the Legislature intended that the costs of such elimination should be paid by the State, county and town, or by the State and county alone, in the same manner as the costs of construction were originally paid, it was necessary to continue the word "town" in the statute when it was amended. By this construction, the two statutes are harmonized; both are given force and effect, and no repeal by implication is required. It is apparent that the Legislature intended to eliminate the town from contribution for both construction and elimination expenses after April 2, 1912, and I think it is also quite apparent that it intended to continue the liability of towns to contribute its fifteen per cent of the expenses for elimination of all grade crossings on county highways which were constructed before that date.

While this subject is not entirely clear of all doubt, I am forced to the conclusion that the towns are still liable for fifteen per cent of the cost of all eliminations of grade crossings upon county highways which were constructed under the law as it stood prior to April 2, 1912, but are not liable for any portion of the expenses of

elimination of grade crossings upon such county highways as have been constructed under the law as it has existed since that date.

Dated, December 13th, 1916.

E. E. WOODBURY,

Attorney-General.

By MERTON E. LEWIS,

First Deputy.

To Hon. EDWIN DUFFEY, *State Commissioner of Highways,*
Albany, N. Y.

CUTTING ICE ON STATE CANALS — APPLICATION OF SUBDIVISION 13, SECTION 33, CANAL LAW — WHEN SUPERINTENDENT OF PUBLIC WORKS MAY EXACT COMPENSATION.

Subdivision 13, section 33, of the Canal Law, authorizing the Superintendent of Public Works to issue permits on such terms as he may deem advantageous to the State to any person to cut ice from State canals, applies to ice found on the artificial canals of the State and to the artificial works connected therewith, such as reservoirs, feeders, etc., but has no application to ice found on the navigable rivers of the State which have merely been canalized under the Barge canal improvement.

INQUIRY

The Superintendent of Public Works points out that since the canalization of portions of the Mohawk and Hudson rivers a question has arisen as to his authority under subdivision 13, section 33 of the Canal Law, to issue permits and exact compensation as a condition of permitting persons to harvest ice therefrom. He points out that the improvement of the Hudson and Mohawk rivers has been accomplished not only by deepening the same, but also, in some localities by raising the pool elevation by means of dams thus providing a greater area of water than the natural water area; that at every point on the canalized rivers some improvement has been made which has changed the natural conditions, etc., and requests an opinion as to his authority to exact compensation for cutting ice on said canalized rivers in the following class of cases:

1. Where the river channel has been deepened without appropriation by the State of any land on either side of the river.

2. Where, by the appropriation of land on either side of the river, the State itself becomes the riparian owner and its lands must be crossed to reach the river.
3. Where the elevation of the river has been raised by the construction of dams and the area of the water vastly increased, the State acquiring flowage rights on either shore.
4. Where the sole improvement to the river has been deepening of its bed but no appropriation has been made of land on either side of the stream nor any increase in the surface area.

OPINION

Broadly speaking I am of the opinion that the application of subdivision 13, section 33 of the Canal Law is limited to the artificial canals of the State and to the works connected therewith such as reservoirs, feeders, etc., and has no application to ice formed on the canalized Hudson and Mohawk rivers.

In determining the rights of the State in the premises two fundamental rules must be borne in mind.

First, the general rule is well settled that on non-navigable rivers, at least, the right to harvest ice is in the owner of the bed thereof.

In 40 Cyc. 844, the rule is laid down that:

“Ice forming upon water belongs to the owner of the soil beneath the water.”

“A riparian proprietor is the owner of the ice which forms over that portion of the bed of the stream which he owns and has the right to cut and sell it. * * *

In 29 Cyc. 331, the rule is laid down that:

“The owner of the soil under the water is ordinarily the sole and exclusive owner of the ice forming upon such water and the riparian ownership of the bed of a stream carries with it the right to the ice forming upon that surface as far as the riparian right to the soil extends. * * ”

In *Slingerland v. International Contracting Co.*, 43 A. D. 215, 224 (affd. in 169 N. Y. 60), the court says:

“The owners of the waters of a mill pond own the ice formed upon it. The owner of the bed of a stream owns the

ice within it. (*Myer v. Whitaker*, 55 How. Pr. 376; *Swan vs. Goff*, 39 A. D. 95) * * *."

The same rule is laid down in *Valentino v. Schantz*, 216 N. Y. 1, where it is said:

"A riparian owner above a mill dam has the fixed and well defined right to take ice from the stream where it flows over his land. The owners of the mill dam cannot avail themselves of such right notwithstanding the fact that their action may be said to have rendered its exercise possible."

Applying this rule it was held in *Green Island Ice Co. v. Norton*, 105 A. D. 331 (affd. in 198 N. Y. 529), that the State being the owner of the fee of the bed of the Mohawk basin it was competent for the Legislature to restrict the right to take ice therefrom to persons obtaining permission so to do from the Superintendent of Public Works.

"If (says the court) the ice belongs to the owner of the fee where it is formed, then the ice in question here belongs to the State. 'Lands appropriated by the canal authorities for the use of the canal, under the statute, are held by the State in fee.' (*Sweet v. City of Syracuse*, 129 N. Y. 316, 334; *Heacock & Berry v. State of New York*, 105 id. 248.)

"It seems to me that the control that the State has over the canals and their waters is different from that which it exercises over the navigable waters of the State. The one it exercises by right of sovereignty, and 'among other rights which pertain to sovereignty is that of using, regulating and controlling for special purposes the waters of all navigable rivers or streams, whether fresh or salt, and without regard to the ownership of the soil beneath the water.' (*Smith v. City of Rochester*, 92 N. Y. 463, 477.)

"In the case of its canals, as we have seen, it owns the fee of the land beneath the waters and the strip of land on each side; it owns it as it owns its public buildings, and while that ownership is for the benefit of the people, and one in which the people have an interest, that interest is a collective, not a several interest, not an interest which permits any one of

the people by right of first appropriation to take a portion thereof and reduce it to private ownership."

It will be observed that the court clearly distinguishes between the rights of the State in its canal proper and in its navigable waterways canalized.

The same distinction is pointed out in Gould on Waters, 3d Ed., section 191, where it is said that:

"When the State appropriates the fee of land for the construction of canals, the former owner has no right to take ice therefrom; but if the canal is simply a servitude the owner of the feet is entitled to take the ice when its removal does not interfere with the navigation or the use of the water for hydraulic purposes."

A reading of the communication of the Superintendent of Public Works presenting this inquiry discloses that, in the main, the State has, in the exercise of its reserved sovereign right, and without any appropriation, merely entered upon and improved the navigation of these navigable streams.

Such action did not, in my opinion, serve to divest riparian owners of any riparian rights, or the public of any rights which they possessed in these waters prior to the State's entry. If prior thereto they possessed the right to cut ice thereon the mere fact that the State has seen fit to enter upon and make use of the streams for canal purposes, and accordingly to alter the natural conditions to meet the needs of navigation, does not divest them of those rights.

Riparian owners on these rivers whose title extends to the thread of the stream would seem under the rule heretofore stated) in the absence of the exercise by the State of the power of eminent domain, depriving them of the right), entitled to harvest ice formed on the water within their property lines.

In Williams v. City of Utica, 217 N. Y. 162, it was held that the patent therein involved, because of the peculiar language employed, carried title to the bed of the Mohawk river; but in the more recent case of Danes v. State, 219 N. Y. 67, the Court of Appeals reiterates the general rule that the title to the beds of the

Mohawk and Hudson rivers above, as well as below the influence of the tide, is in the State.

I think it may fairly be laid down as a general rule, permitting of but few exceptions, that the State holds fee title to the bed of the Mohawk and Hudson rivers, but it holds this title not as a proprietor but as a sovereign in trust for the people.

As stated in *Rossmiller v. State*, 58 L. R. A. (Wis.) 93, 98:

"Wherever the title to the beds of navigable waters is in the State for public purposes, all the incidents of public waters at common law exist, and that they include the public right of taking ice to the same extent as the right of taking fish, etc."

The rule is stated in 29 Cyc. 331, as follows:

"In the absence of a statute to the contrary, where the State owns the bed of a stream, the right to cut ice thereon, is a common right of the public, where there is no interference with any other person to a like enjoyment, subject only to such mere police regulations as the Legislature may prescribe to preserve the common right. Subject to such rules, one person has the same right to the ice formed upon public waters as has another until there has been an actual appropriation of such ice. The State is not the owner of ice formed on public waters, and has no right to sell it. The limit of State authority to interfere with the taking of ice from public waters is the making of regulations which will preserve the common right to do so."

In *Slingerland v. International Contracting Co.*, 43 A. D. 215, 224 (affd. in 169 N. Y. 60), the court says:

"The State owns the Hudson river in trust for the use of the public. Apart from the statute about to be considered (referring to the statutes now embodied in article XVI of the General Business Law), the ice formed upon it, like the fish within it, become the property of the captor who first peacefully seizes it."

The opinion of the Court of Appeals in the same case (169 N. Y. 60, 72) states that:

"The Hudson river, being a navigable stream, the ice formed therein belongs to the first appropriator and the right to take it is one owned in common with the public; except as an exclusive privilege is conferred by the statute upon the owners, or lessees, of ice houses on the river of cutting and gathering the ice formed in the waters adjacent to their lands, upon compliance with certain conditions. (Chapter 953, Laws of 1895; chapter 388, Laws of 1879.)"

In *American Ice Co. v. Catskill Cement Co.*, 43 Misc. 221, 226, the court says, speaking of the Hudson river, that:

"It has been the law of this State until the Legislature otherwise decreed (by chapter 953, Laws of 1895, and chapter 264, Laws of 1899) that this ice was common property and belonged to the first appropriator."

See also *Briggs v. Knickerbocker Ice Co.*, 11 Misc. 197.

The New York cases cited had to do with the Hudson, a river navigable in law as well as in fact; but the authorities appear to apply the rule there laid down to rivers navigable in fact but not in law (such as the Mohawk, and the Hudson above tide water), the title to which is held by the State as a sovereign in trust for the public, and to hold that:

"The right of every person within the State to enjoy its public waters for every legitimate purpose, including the cutting and appropriation of ice, which does not wrongfully interfere with the right of any other person to like enjoyment, subject only to such mere police regulations as the Legislature may in its wisdom prescribe to preserve the common heritage of all is a constitutional right of all persons within the State."

and that the State possesses no such property right or interest in the waters of such stream or the ice formed therefrom as will permit it to sell the same. (*Rossmiller v. State*, 58 L. R. A. [Wis.] 93.)

The distinction in this respect between ice forming on canalized streams and on artificial canals is adverted to in the opinion of the court in *Green Island Ice Co. v. Norton* (*supra*). It lies in the different character of the State's ownership of the two things.

As to ice forming upon its public rivers which have merely been canalized, the only power possessed by the State is one of regulation.

So far as the Hudson is concerned, the upland owners possessing ice houses on the banks thereof are afforded a preferential right to the ice forming thereon by virtue of the provisions of article XVI of the General Business Law, which has been sustained by the courts only as an exercise of the State's power to *regulate* the taking or appropriation of the ice. (*Slingerland v. International Contracting Co.*, 43 A. D. 215; affd. in 169 N. Y. 60.)

Applying these rules to the above enumerated situations:

1. The fact that the State has entered upon these rivers and merely canalized and deepened them (without making any appropriation) does not in my opinion operate to divest riparian owners or the public of their former rights to the ice formed thereon.

2. The fact that the State has appropriated or owns portions of the banks of these rivers has no bearing on the question of the right of the public or the riparian owners to cut ice thereon, the determining factors being that the rivers are public navigable rivers and, assuming that the State has title to the bed, it is as a sovereign in trust for the public.

3. With respect to the situations enumerated in the third classification, I am informed that at certain points on the Hudson and Mohawk rivers the State has erected dams which cause the water to overflow the natural banks of the river and submerge large areas of natural upland to which the State has by appropriation or otherwise obtained the absolute fee title. Thus a large ice field has been created on and over land outside of the natural bed of the river, to which land the State owns the absolute fee title.

While the State has no title to the ice formed within the limits of the natural bed of these rivers, applying the rule laid down in *Green Island Ice Co. v. Norton* (*supra*) and other cases, I am persuaded that it has such a proprietary title to and interest in the ice formed on these artificial areas, without the limits of the natural bed, that it may sell or dispose of the same, and that the

aforesaid provisions of section 33 of the Canal Law apply to ice found on these areas.

4. Under the state of facts assumed in the fourth classification I think the State does not possess the right to sell the ice formed upon these rivers.

I have not considered it necessary and have not intended by the foregoing to express any opinion as to whether the riparian owners along these streams possess any rights in the ice formed thereon superior to the rights of the general public.

Dated, December 19, 1916.

E. E. WOODBURY,

Attorney-General.

To Hon. WILLIAM W. WOTHERSPOON, *Superintendent of Public Works, Albany, N. Y.*

OPINIONS

(INFORMAL OR LETTER)

O P I N I O N S

(INFORMAL OR LETTER)

PRISON LAW — CODE OF CRIMINAL PROCEDURE — CERTIFICATES OF REASONABLE DOUBT.

A prisoner who obtains a certificate of reasonable doubt may not have counted in his favor the time he is at liberty under such certificate upon his prison sentence.

INQUIRY

If a prisoner is released from prison upon a certificate of reasonable doubt, which certificate is thereafter vacated and he is returned to prison, does the time he was out of prison by reason of such certificate count as part of the term of his original sentence?

OPINION

My conclusion is that the issuance of the certificate of reasonable doubt stays the execution of the sentence. This is based upon section 531 of the Code of Criminal Procedure, as follows:

“If, before the granting of the certificate, the execution of the judgment have commenced, the further execution thereof is suspended and the defendant must be restored by the officer in whose custody he is to his original custody.”

The result would be, therefore, that during the time he was out of prison under the certificate, his sentence would cease to run and upon his return he would have to serve the interrupted time.

Dated, January 6, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. JOHN B. RILEY, *Superintendent of State Prisons, Albany, N. Y.*

DOMESTIC RELATIONS LAW—COMMON LAW MARRIAGES—SAVING CLAUSE, § 19.

A marriage consummated upon the high seas, by the captain of the vessel would be invalid under our laws, unless one or both of the contracting parties believed, in good faith, that the person solemnizing the marriage had authority to do so.

INQUIRY

Does a marriage ceremony performed by the captain of a vessel owned by a New York State corporation upon the high seas purporting to unite in wedlock two residents of the Kingdom of Denmark constitute a legal marriage under the laws of the State of New York?

OPINION

My opinion is asked as to the validity of a marriage between Peter Theodor Thogerson and Valborg Maria Stumann, and I am informed by the papers accompanying the inquiry that, on July 8th, 1907, the above named parties, both residents of Copenhagen, Denmark, and I assume citizens of that country, were married by one A. W. Nelson, Captain of the Pacific Mail S. S. "City of Panama," on board said ship; that at the time of such marriage the ship was seven nautical miles from land. The marriage ceremony was performed by such captain upon the mutual request of the contracting parties, but there is nothing to indicate that the captain was clothed with any authority to perform such ceremony, as provided by and under the statutes of this State, and I assume for the purpose of this opinion that he had no right to solemnize such a marriage according to the laws of this State. The certificate is signed by three witnesses.

It is stated in the letter of Hon. T. W. Gregory, United States Attorney-General, to the Secretary of State, Hon. Robert Lansing, that the validity of this marriage will depend upon the laws of this State, and the reason given for such statement is the fact that the "City of Panama" is owned by the Pacific Mail Steamship Company, which is incorporated under the laws of the State of New York.

The two contracting parties were residents and citizens of a foreign country at the time of such marriage, and the ceremony was performed outside of the three mile limit and therefore outside of the jurisdiction of both the United States and the State of New

York, and having been performed upon the ocean outside of the jurisdiction of any country, it would appear to me that it is more important to ascertain whether the marriage was valid by the laws of Denmark. However, it has been held that the validity of a marriage is to be determined by the law of the State where it was entered into (*Van Voorhis v. Brintnall*, 86 N. Y. 18), and as the vessel upon which the marriage was solemnized was owned by a New York corporation and sailing under the American flag, and registered at the port of New York, it is deemed essential that the marriage should be tested by the laws of the State of New York, and inasmuch as Mr. Brun, the Danish minister, has asked the question "whether the marriage was a lawful and valid marriage according to the laws of the State of New York," I have given the subject consideration along those lines.

Prior to the enactment of chapter 339 of the Laws of 1901, a man and woman, by agreeing to be married, followed by cohabitation and mutual acknowledgment by both of the existence of the marital relations and by holding each other out to the world as husband and wife, thus became legally married, and such marriages were known as "common law" marriages, but, by the passage of the above act, section 19 thereof provided that no marriage, after January 1st, 1902, should be valid unless solemnized as therein stated, and this provision remained in force until the passage of chapter 742 of the Laws of 1907, which took effect January 1, 1908. This section 19 was repealed by the last mentioned act and since that time there has been no direct prohibition against common law marriages except as the statute provides that all marriages *must* be solemnized by certain clergymen and officers named therein, which inferentially at least prohibits the consummation of marriage by common law methods. This section was in full force and effect at the time of the marriage, or pretended marriage, of the parties under consideration herein; however, there is a saving clause for marriages solemnized under certain conditions, and for a better understanding of its provisions, it is here given in full:

"§ 19. No marriage claimed to have been contracted on or after the first day of January, nineteen hundred and two,

within this State, otherwise than in this article provided, shall be valid for any purpose whatever, provided, however, that no such marriage shall be deemed or adjudged to be invalid, nor shall the validity thereof be in any way affected on account of any want of authority in any person solemnizing the same under subdivision one, two, three and four of section eleven of this article, if consummated with a full belief on the part of the persons so married, or either of them, that they were lawfully joined in marriage or on account of any mistake in the date or place of marriage or in the residence of either of the parties in case of a marriage solemnized under subdivision four of said section eleven."

" § 7. This act shall take effect on the first day of January, in the year nineteen hundred and two."

It will be observed that notwithstanding the prohibition of common law marriages which continued down to January 1, 1908, it was provided that such a marriage should not be held to be invalid for want of authority in the person solemnizing the same, if consummated with a full belief on the part of the persons so married, or either of them, that they were so married, and if it is a fact that one or both of the parties believed that the captain had the authority to marry them, and acted upon that assumption, the marriage would be held valid so far as the laws of this State are concerned. (Matter of Hinman, 147 App. Div. 452.)

I have been unable to find any case where a marriage was consummated upon the high seas except by a minister of the Gospel.

In Culling v. Culling, 74 Law Times Reports, 252, it was held that a marriage solemnized by a clergyman of the Established Church of England, at sea, without the publication of banns or the obtaining of a license, was a valid, common law marriage.

If the marriage of these two parties can be sustained upon any ground under our laws, it would have to be under the saving clause of section 19, as it was not claimed that there was any written contract made and signed by the parties as provided by section 11 of the Domestic Relations Law, as amended by chapter 339, Laws of 1902, nor that the captain had any authority to perform the ceremony as required by our statutes.

Foreign marriages have been held valid here as respects the inheritance of property.

Haynes v. McDermott, 7 Abb. N. C. 98.

It has also been held that:

"Unless expressly so provided by statute a marriage solemnized by an unauthorized person is not void where the parties assent to the marriage and it is acknowledged and consummated by cohabitation as husband and wife."

Hunter v. Milan, 41 Pacific, 332.

Londerry v. Chester, 2 N. H. 268.

This principle would apply to these parties if it were not for the fact that our statutes did expressly provide the persons who could solemnize marriages, and a captain of a vessel is not one of the persons mentioned therein. And it appears very clearly that the only way the marriage in question can be held to be valid is under the saving clause of section 19 as hereinbefore stated.

I do therefore conclude that the marriage of Peter Theodor Thogersen to Valborg Maria Stumann by the captain of the steamship "City of Panama" was valid so far as the laws of the State of New York apply, provided either or both of the two contracting parties fully believed that they were lawfully joined in marriage.

I herewith return the marriage certificate.

Dated, January 24, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. CHARLES S. WHITMAN, *Governor, Albany, N. Y.*

ATTEMPTED COMMON LAW AND CONTRACTUAL MARRIAGE IN JAPAN — NOT VALID IN NEW YORK STATE — CITIZENSHIP OF ILLEGITIMATE CHILD A FEDERAL QUESTION — DOMESTIC RELATIONS LAW, § 11 — UNITED STATES REVISED STATUTES, § 1993 — CIVIL CODE OF JAPAN, ARTICLES 775, 836 — ARTICLES XIII AND XIV "THE LAW CONCERNING THE APPLICATION OF LAWS IN GENERAL" OF JAPAN.

A so-called common law marriage and an attempted contractual marriage between a citizen of the State of New York and a Japanese woman in Japan would not be recognized as a valid marriage in New York State because not recognized as a valid common law or statutory marriage in Japan. Whether an illegitimate child of such parties is

a citizen of the State of New York depends primarily upon whether he is a citizen of the United States, and of that question the Federal government has exclusive jurisdiction.

INQUIRY

1. Is a common law marriage contracted in Japan between a citizen of the State of New York and a Japanese woman a legal marriage under the laws of the State of New York, and
2. Is the issue of such a marriage a citizen of this State?

OPINION

Peter Wallace, Jr., was born on March 18, 1905, of Sato Tani, a Japanese woman, a subject of that country. At the time of such birth, the parents were not married and the child was born an illegitimate. The father and mother continued to cohabit and live together until March 26th, 1910, at which time they entered into a contract by which they agreed to take each other as husband and wife. This contract of marriage was duly signed and sealed by the respective parties at Maiboong, Unsan District, Empire of Korea, in the presence of two witnesses and was duly acknowledged by both before Ozro C. Gould, Vice and Deputy Consul General of the United States, at Seoul, Korea.

Peter Wallace, Sr., the father of Peter Wallace, Jr., was at the time of such marriage and still is a citizen of the United States and a resident of the State of New York, and has never taken any steps to become a citizen of Japan, or any other foreign country, and still claims to be a citizen and resident of the State of New York.

The questions formulated by the Department of State at Washington for answer by our State authorities are these:

1st. Was the marriage of Peter Wallace, Sr., and Sato Tani a legal marriage under the laws of the State of New York?

2nd. Does the marriage of the parents of Peter Wallace, Jr., establish his status as a citizen of the State of New York?

It has been repeatedly held in this State that the law of the State or country where the marriage takes place will control the question whether or not the marriage shall be recognized as valid in this State. (*Miller v. Miller*, 91 N. Y. 315; *Olmsted v. Olmsted*,

190 N. Y. 464.) We are concerned therefore in ascertaining the law of Japan, in which country Peter Wallace and Sano Tani were domiciled when the marriage ceremony was attempted.

Previous to the Civil Code of Japan (enacted July 16, 1898) "common law" marriages were recognized in that country. But since that date the legal formalities of marriage must be followed. These are a contract either written or oral in the presence of two witnesses, and filed with or notified to and thereafter recorded by the Registrar of the Family Registry Office of the city or village (article 775, Civil Code of Japan). So that, assuming as we must that these formalities were not followed, there has been I conclude no legal marriage of Wallace and the Japanese woman so far as the laws of Japan are concerned.

Article XIII of the Japan statute entitled "The Law Concerning the Application of Laws in General," provides that:

"The conditions of the formation of a marriage are determined in respect to each party by the law of his or her home country, but as regards form, the law of the place of celebration of the marriage governs."

And article XIV of the same statute provides:

"The effect of a marriage is determined by the law of the home country of the husband."

This means that the formalities of a marriage in Japan must be those of Japan; and such rule is in harmony with the rule as stated in the New York cases, i. e., the law of *lex loci* governs. The conditions which must exist to authorize a marriage are determined by the laws of the home country of each party (conditions as to age, capacity, consent, etc.), and those which spring into existence after the marriage are those of the home country of the husband.

Section 24 of the New York Domestic Relations Law, providing that illegitimate children are legitimatized by the subsequent marriage of the parents, is the law of the home country of Peter Wallace, the husband, and would, since Japan permits that statute to operate within its borders, legitimatize the child in Japan, provided of course a valid marriage had taken place in Japan accord-

ing to the laws of that country. Japan also has a statute legitimizing children upon the marriage of the parents (article 836, Civil Code of Japan). The child having once been legitimatized in Japan, would then be recognized as legitimate by the courts of this State. (*Miller v. Miller, supra.*)

All these statutes and rulings, however, presuppose a valid marriage in Japan.

We have thus far observed why there was no common law or statutory marriage of Peter Wallace and Sato Tani under the laws of Japan. Nor was there a written contractual New York marriage at the American Consulate in compliance with the Domestic Relations Law of this State (section 11), for the reason that the contract was not acknowledged before a judge of a court of record as that section provides. Nor do the New York courts recognize a common law marriage which was not recognized by the law of the country in which the parties resided when the relations were being carried on. (*Matter of Hall, 61 A. D. 266.*)

I conclude, therefore, upon the facts as stated that New York State will not recognize a marriage as existing between Peter Wallace and Sato Tani.

With respect to the question of citizenship (the second question propounded) I feel that more properly it should be left to the State Department at Washington. The department apparently desires to determine whether Peter Wallace, Jr., is a citizen of the United States, and the solution of that question depends in my opinion entirely upon a construction of section 1993 of the United States Revised Statutes: "*Citizenship of children of citizens born abroad.*" All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States." A determination by this office that Peter Wallace, Jr., was a citizen of New York would involve nothing other than a bold interpretation by me of section 1993, a Federal

statute, for no person so far as I can discover can be a citizen of New York without first being a citizen of the United States.

Dated, January 26, 1916.

E. E. WOODBURY,

Attorney-General.

To Hon. FRANCIS M. HUGO, *Secretary of State, Albany, N. Y.*

BOARDS OF SUPERVISORS — POWERS, ETC.

A board of supervisors has no authority to appropriate money for the suppression of the mosquito nuisance.

INQUIRY

Has a Board of Supervisors authority to appropriate money for the distribution, throughout the schools of the county, of cards regarding the mosquito evil, for the purchase of moving picture films or for paying the expenses of public speakers?

OPINION

It has been held (*Wakely v. McIntyre*, 154 N. Y. 628), that Boards of Supervisors, in the exercise of legislative powers conferred upon them by the Constitution, are not confined in their action to the bare letter of the statute, but may in the exercise of sound discretion act under powers that are to be fairly implied. However this may be, some statute must be found either expressly or impliedly authorizing the act sought to be accomplished.

I have searched the County Law to find some provision that would "either expressly or impliedly" authorize the appropriation above referred to, but I am unable to find any such provision which I think can be construed to cover it. It is provided in section 240 of the County Law, subdivision 15, that "the expenses necessarily incurred, and sums authorized by law, or by the Board of Supervisors pursuant to law, to be raised for any county purpose," shall be county charges. This provision is the only one that can be stretched to cover such an appropriation, but any expenses authorized by the Board of Supervisors must be pursuant to some act of the Legislature, expressed or implied, and unless there is some enactment that I have overlooked, there is no such law.

The abatement of nuisances and the suppression of evils that are detrimental to the public health, subject to such supervision over them as the State Board of Health is given by statute, is vested in the local boards of health, and sections 27, 28 and 29 of the Public Health Law relate to the suppression of the mosquito evil and should be followed, and if the statute is insufficient it would be preferable to have it amended rather than to adopt some course that is not authorized by statute.

I take it that the contemplated purchase of films to be displayed in moving picture shows and expense of securing public speakers is all along the line of the abatement of the mosquito nuisance, and the whole of the proposed appropriation of \$1,600 is subject to the suggestion hereinafter made.

I do, therefore, advise you that the Board of Supervisors of Westchester County have not the authority to make the appropriation referred to in your letter for the purposes therein stated.

Dated, February 21, 1916.

E. E. WOODBURY,

Attorney-General.

To Hon. HERMANN M. BIGGS; *Commissioner of Health, Albany, N. Y.*

COUNTY CHARGES — EXPENSES CONNECTED WITH PROCEEDINGS FOR REMOVAL OF SHERIFF FOR MISCONDUCT IN OFFICE — COUNTY LAW, § 240, SUBD. 16.

INQUIRY

First. Where charges have been preferred against a sheriff, and the sheriff subsequently removed by the Governor, are claims for services and expenses rendered by the referee appointed by the Governor, the Deputy Attorney-General and assistant counsel and expert accountant, legal claims against the county?

Second. Are the claims of the attorneys employed by the sheriff to defend him in his case legal claims against the county?

OPINION

Subdivision 16 of section 240 of the County Law provides as follows:

"The following are county charges:

* * * * *

" 16. The reasonable costs and expenses in proceedings before the Governor for the removal of any county officer upon charges preferred against him, including the taking and printing of the testimony therein."

It is, therefore, apparent that all expenses set forth in the first paragraph of your letter are proper county charges. Those in the second paragraph are not lawful county charges. Both these conclusions have been judicially arrived at and are discussed at length in *People ex rel. Nash v. Board of Supervisors*, 164 A. D. 89, 94, to which you should refer.

Dated, March 1, 1916.

E. E. WOODBURY,

Attorney-General.

To SILAS F. POTTER, *Esq., West Vienna, Oneida County, N. Y.*

BARGE CANAL LAW — SECTION 3 — REBUILDING BRIDGES.

New bridges shall be built over the canals to take the place of existing bridges whenever required or rendered necessary by the new location of the canals.

INQUIRY

Do the provisions of the Barge Canal Law require the reconstruction of a bridge across the canalized river at Northumberland?

OPINION

I concur in the opinion rendered by Attorney-General Carmody under date of June 12, 1914, to State Engineer Bensel, to the effect that the provisions of section 3 of the Barge Canal Law:

"New bridges shall be built over the canals to take the place of existing bridges wherever required or rendered necessary by the new location of the canals,"

make it incumbent upon the State to rebuild the bridge spanning the Hudson river a short distance above the State dam at Northumberland.

This conclusion would seem to be further borne out by the so-called Bond report, which as I understand it, formed the foundation whereby the Legislature arrived at the conclusion that it would cost \$101,000,000 to construct the canal. Accompanying this report is a schedule of the various bridges which will be encountered and the disposition to be made thereof (p. 443 *et seq.*). In this schedule (p. 478) is included the Northumberland bridge at Station 1648, which, according to the schedule, is to be rebuilt or replaced at an estimated expense of \$52,532.

I think it was the legislative intent to provide for the reconstruction of this bridge.

Dated, March 8, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. FRANK M. WILLIAMS, *State Engineer and Surveyor,*
Albany, N. Y.

PRISONS — ARCHITECTURAL SERVICES — COMMISSION ON NEW PRISONS —
WINGDALE PRISON.

Contracts between Commission on New Prisons and William J. Beardsley with reference to architectural services rendered in connection with proposed new prison at Bear Mountain and Wingdale considered with reference to the relations of the State to such architect under such contracts and the compensation, if any, due to him by reason of the abandonment of the work contemplated by such contracts.

INQUIRY

The original contract between the State of New York by the Commission on New Prisons with William J. Beardsley, dated November 13, 1908, together with supplemental contract between the same parties, dated September 26, 1910, were submitted to the Attorney-General by Senator Henry M. Sage, chairman of the Senate Finance Committee, making inquiry with reference to the relations of the State to Mr. Beardsley by virtue of such contracts and the statutes in relation to the erection of a new prison at Bear Mountain and Wingdale.

OPINION

I understand your inquiry to be with reference to the status of the claim of Mr. Beardsley against the State by reason of these

contracts and by reason of the statutes which have been passed relating to the erection of a new prison at Bear Mountain and Wingdale. More particularly, I understand that you have introduced a bill in the Senate, introductory No. 816, printed No. 895, providing for the erection of a new prison at Wingdale or Beekman, the architectural work to be performed by the State Architect rather than Mr. Beardsley, even though the prison should be erected at Wingdale.

I have examined very carefully the opinions rendered by Attorney-General Carmody, addressed to the Commission on New Prison, with reference to this subject (see opinions of Attorney-General, 1912, pages 138, 173; 1913, page 553). Mr. Carmody came to the conclusion that the claim of the architect for a percentage compensation on the contract price of the new prison at Wingdale was not a legal claim against the State. I have been disposed to concur in the opinion of Mr. Carmody, but I find upon a careful examination of the statutes that he has omitted to take into consideration a provision of chapter 447, Laws of 1909, which seems to me to cure any legal defects in the contract of November 13, 1908. It was provided as follows:

“The previous acts of the commission in employing the architect who has submitted said plans are hereby legalized, ratified and confirmed, and the commission is hereby authorized to extend his employment to cover the additional expenditure herein authorized.”

As indicated in the opinion of Mr. Carmody, chapter 364, Laws of 1910, provided for the abandonment of the Bear Mountain site, and chapter 365, Laws of 1910, provided for the acquisition of a new site, and the construction of the prison on such site in substantial compliance with the plans for the Bear Mountain site. Existing laws providing for such plans and authorizing the employment of the architect submitting the same were, by that statute, made applicable to the construction of a prison on the new site.

The original contract having been ratified, legalized and confirmed by the Legislature, and the Legislature having recognized the existence of this contract of employment by authorizing its continuance in connection with the new site, the supplemental contract of September 26, 1910, naturally followed.

The Legislature having ratified, legalized and confirmed the "acts of the commission" in employing the architect who submitted the plans which were accepted, overcame the objections raised by Mr. Carmody as to the legality of the contract, for what the Legislature had the power to do in the first place, it had the power to validate, and there can be no question but that the Legislature had the power to authorize the making of a contract to employ a private architect.

We are left then to consider the contracts which were made. In providing competition for awards with reference to plans, specifications and estimates, the commission offered to the architect receiving the first award that he should be appointed the architect of the buildings.

Sections 9 and 10 of chapter 570, Laws of 1906, as amended by chapter 521, Laws of 1907, authorized public competition for the furnishing of designs, plans, specifications and estimates for the construction of a new prison. A board of award was constituted to examine the sealed proposals and to select therefrom its first, second and third choice, and section 10 provided as follows:

"The plans, specifications and estimates so selected shall be the absolute property of the State, but such award shall not be deemed to be an acceptance of any plan so submitted and selected."

Section 11 of the same statute, as amended by chapter 521, Laws of 1907, provided as follows:

"The said commission is hereby authorized to use not exceeding \$10,000 of the money herein appropriated for the awards to be made by said board under the provisions of section 10."

It will be seen that the board was not authorized to make an offer, to the author of the design receiving the first award, to appoint him the architect of the buildings, but that an appropriation of \$10,000 was made for the purpose of these awards, it being contemplated by the Legislature that the plans, specifications and estimate selected should thereby become the absolute property of the State and the award should not be deemed even an acceptance

of the plan selected. Notwithstanding that fact, I find from an examination of the rules and regulations governing the competition, as published by the commission on January 15, 1908, a copy of which I have before me, that the commission made the following offer to those competing for these awards:

“The author of the design determined to have the highest order of merit will be appointed architect of the buildings, subject to such association with some other architect as the board may deem necessary, in a contingency hereinafter mentioned and will be paid the customary fees therefor, as set forth in the schedule of minimum charges heretofore established by the American Institute of Architects, subject to the limitations hereinafter stated. The compensation of the architects will be paid from time to time as in the opinion of the said commission may be just.

“The author of the design determined to be entitled to second place in the order of merit will be paid the sum of \$3,000.

“The author of the design determined to be entitled to third place in the order of merit will be paid the sum of \$2,000.

“Each of the authors of the seven designs determined to be entitled to the next highest order of merit will be paid \$500. The three most meritorious designs will then become the property of the State.”

The “contingency” above mentioned relates to another paragraph of the rules and regulations whereby the commission reserved the right to require that the successful architect should associate with himself some architect satisfactory to the commission in the event that the author of the first design should not be a person of sufficient experience and standing to qualify him for so important a trust.

Inferentially, at least, the board was not authorized to make his selection as architect the price for the first award inasmuch as \$10,000 was evidently appropriated for the purpose of purchasing such selected designs. But later in the year 1908, viz.: May 6,

1908, the Legislature authorized the commission to employ such successful architect.

On March 3, 1908, the commission issued a modified program relating to the competition, a copy of which I have before me, and therein extended the time of closing the competition to May 4, 1908. Perhaps the making of the award was held pending the enactment of the act of May 6th. I have no information as to that; but the contract with Beardsley, the successful architect, was not entered into until the 13th of November, 1908. There was nothing in the act of May 6th, 1908, which legalized the act of the commission in making the offer of employment, but even if that act was *ultra vires*, the illegality of their action in exceeding their authority was cured by the validating act of 1909. (Chapter 447, Laws of 1909.)

Since the offer made by the commission to employ him as the architect of the buildings was one of the "acts of the commission" specifically legalized by the Legislature in 1909, it cannot be said that, prior to his employment he had been paid for his plans, specifications and estimates. Therefore the contract of November 13, 1908, which provided among other things that he should be paid for his designs, plans, etc., and which was legalized, did not provide double compensation therefor.

It is plain that both the statute providing for the competition (Laws of 1907, chapter 521) and the offer made by the commission provided that the designs, etc., of the architect receiving the first award should become the absolute property of the State. Thus he may be considered to have competed upon that condition. He also competed upon the condition that, if successful, he would be employed as the architect of the buildings and receive the customary fees therefore, as set forth in the schedule of minimum charges theretofore established by the American Institute of Architects, subject to certain expressed limitations as to engineering services and revision of plans. No provision was made in his contracts reserving to him any rights to the designs, etc. He was actually employed as architect and his designs, plans, specifications and estimates thus became the absolute property of the State. His remedy, if any, is not to claim title to his designs, etc., but

to predicate any claim he may have upon his contract with the State which was legalized by the Legislature.

Starting with the assumption that a legal contract was entered into pursuant to a legal offer by reason of the legalizing act of the Legislature, the disposition of the matter must be in accordance with the general law of contracts. The courts in this State have held that, in the absence of fraud or collusion, the acts of public officers acting on behalf of the State within the limitations of the authority conferred upon them and in the performance of their duties in dealing with third persons, are the acts of the State and cannot be repudiated by it. (People v. Stephens, 71 N. Y. 527.) I have not had sufficient facts presented to me to determine the question whether there was fraud or collusion, and I therefore cannot pass upon that question.

Therefore, we are left to the consideration of the contract itself to determine the rights of the parties, subject, however, to one exception, namely, the limitation of the power of the Legislature as prescribed by the Constitution. The Legislature has no constitutional authority to "grant any extra compensation to any public officer, servant, agent or contractor." (Constitution, article III, section 28.) The legalizing of the offer of the commission and the subsequent contract justified making him architect and paying him the customary fees for such work. But if the subsequent contract, viz.: the contract of November 13, 1908, goes further so as to agree to pay him something in addition to the offer made and which was accepted, the legalizing act of the Legislature would constitute to that extent an unconstitutional grant of extra compensation by the Legislature to a "public officer, servant, agent or contractor" and would be void, since the validity of the contract itself is dependent upon the legalizing of it by the Legislature. In other words, that portion of the contract could not be validated by the Legislature if it sought to grant to the successful architect compensation in excess of the amount offered and accepted.

Therefore, it is incumbent upon the State to compensate him, if at all, upon the basis of the customary fees for such work as set forth in the schedule of minimum charges theretofore established by the American Institute of Architects and not in accordance with the provisions of the contract itself, if such contract provides ex-

cessive fees. I am not familiar with that schedule of fees prescribed by the Institute of Architects, but the State Architect can undoubtedly supply that data.

The work on the prison having been abandoned, it is important to find what the American Institute of Architects' schedule provides for such a contingency.

Consideration should also be had of the supplemental contract which was entered into after the change of site from Bear Mountain to Wingdale, upon the express authorization of the Legislature (Laws of 1910, chapter 365), particularly with reference to the \$30,000 additional fee provided for in such contract for "extra work in redrafting the plans and specifications for such plant, and the engineering services in connection therewith made necessary by the change of site from Bear Mountain to Wingdale, for making test borings and test pits at the Wingdale site, contour survey on such new site, and of other additional work caused by the abandonment of the Bear Mountain and the selection of the Wingdale site."

I find upon an examination of the rules and regulations for the competition for designs for the Bear Mountain prison that such rules and regulations provided that the architect appointed shall

"So revise his full competitive design as to meet the further requirements of the commission, making therein such alterations, changes and corrections as the commission may require, and may also be required by the State Commission of Prisons, when presented to it for approval as required by law. On the basis of the design so revised he shall prepare full working drawings and specifications and shall during the construction of the buildings have the full and usual authority of architect of the work under and in accordance with the terms of the schedule of the American Institute of Architects."

It is to be noted, however, that this provided for the revision of plans to be used for a particular site which was afterwards changed by action of the Legislature. Perhaps he was entitled to special consideration for the extra work of adapting the plans to the new site and for the test borings, survey, etc., but such extra work so

compensated for should not be included in the estimate of what is due him under the balance of the contract.

The State has definitely abandoned the work then contemplated and the contractors have presented their claims to the Board of Claims and been compensated. If the architect in charge had any remedy under his contract, it must be upon the basis of the abandonment provision of such contract, the fees therein prescribed to be tested in the light of the schedule of fees of the American Institute of Architects. It is my understanding that he has never presented his claim to the Board of Claims for adjudication. If the statute of limitations bars him from presenting a claim by reason of the two-year statute, he is without remedy unless the Legislature prescribes a longer statute of limitations for that purpose. It does not necessarily follow, however, that he is entitled to further compensation because I am informed that he has already received over \$100,000 for this work.

Moreover, there is nothing in the law or in the contracts to bind the State to continue his services after abandonment or suspension, in the conduct of any new work that may be contemplated by the Legislature, either at Wingdale or elsewhere.

The original work and contract having been definitely terminated and the abandonment or suspension of the work having been contemplated and covered by the terms of the contracts themselves, there is no further contract right against the State to employ such architect which would be in any way binding upon any subsequent Legislature.

There is nothing in your bill indicating the use of his designs, plans, etc., for the new Wingdale or Beekman prison, and it would be absurd to contend that, whenever in the future the State undertakes to build a prison either at Wingdale or elsewhere, it would be compelled to adopt the designs, plans, etc., of such architect. If the State desires to do so, however, it may, because they are the absolute property of the State.

I return herewith original contract, State of New York by Commission on New Prisons, with William J. Beardsley, dated Novem-

ber 13, 1908, together with supplemental contract between the same parties dated September 26, 1910.

Dated, March 22, 1916.

E. E. WOODBURY,

Attorney-General.

To Hon. HENRY M. SAGE, *Senate Chamber, Capitol, Albany, N. Y.*

BANKING LAW, § 140—GENERAL CORPORATION LAW, § 22.

Trading stamps that are covered by advertising matter on both sides, payable solely by the corporation issuing them, having no appearance of circulating medium and redeemable by the corporation issuing the same, are not violative of either the banking or corporation law.

INQUIRY

This department is asked whether or not the National Cash Voucher Corporation can legally issue within this State a cash voucher having no appearance of a circulating medium and redeemable solely by that corporation.

OPINION

I have examined the copy of voucher and also the methods to be adopted by the company in the use and circulation of such vouchers.

It appears that the company proposes to print the advertising matter for certain dealers and manufacturers upon the vouchers, and then to place them with dealers in desirable quantities, and the dealers pass them out to their customers. When a customer has secured one hundred, or multiples thereof, he can present the same to any office of the company and in return can receive from such company for such vouchers at the rate of twenty-five cents per hundred. The dealer pays nothing for the vouchers and the only benefit which accrues to him is in the increase of trade.

The vouchers do not circulate as money; they have none of the appearance of money and singly they are of no particular value, and not until they have been gathered in lots of one hundred, or multiples thereof, do they become vested with any appreciable value.

On October 14, 1915, I wrote an opinion relating to certificates which the Moulton Company were proposing to issue, in which I arrived at the conclusion that such certificates were violative of the provisions of section 140 of the Banking Law and section 22 of the General Corporation Law, but the main objections urged to the certificates which the Moulton Company were about to issue do not apply to the certificates under consideration. These certificates have the value plainly printed thereon; they are not redeemable by any particular bank, but solely by the National Cash Voucher Corporation at any of its offices; they are not payable at any bank; they are not to be deposited in any bank for redemption; they could not pass or circulate as money; there is no direction to any bank, bankers or trust company to honor the vouchers upon presentation by the drawee or by anybody else, as they are payable solely by the corporation at their offices; they are covered on both sides with advertising matter and do not have the least appearance of any circulating medium.

After a careful study of the proposed vouchers to be issued by the National Cash Voucher Corporation, I think they can be legally circulated and are not violative of either the Banking or Corporation Law of the State of New York.

Dated, March 24, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. EUGENE LAMB RICHARDS, *Superintendent of Banks, Albany, N. Y.*

CONSTITUTIONAL LAW—VALIDITY OF BILL AMENDING CIVIL SERVICE LAW
(Senate Int. 1224, Prt. 1708—N. Y. Const., Art. III, Secs. 14, 15 and 17).

Senate bill, Int. 1224, Prt. 1708, introduced by Senator Horton, amending Civil Service Law in relation to the classification and grading of State employees and providing that "standard titles, duties, qualifications, grades and rates of compensation, employments and employees in the State Civil Service are hereby created in accordance with the Code of specifications of personal service known as 'Schedule A' contained in the first report of the committee on civil service of the Senate submitted as Senate Document No. 40, under date of March 27th, 1916, which schedule shall have the force and effect of law," is violative of Article III, sections 14, 15 and 17 of the State Constitution.

CONSTITUTIONAL LAW — IMPROPER DELEGATION OF LEGISLATIVE POWER.

A provision in such bill that "the civil service commission shall have the power to amend from time to time the qualifications of specifications contained in 'Schedule A'" would be an improper delegation of legislative power if such schedule is to have the force and effect of law.

INQUIRY

There being a request before Rules Committee of the Assembly for favorable consideration of the Horton Civil Service Legislative Bill, Senate Printed No. 1708, and it being construed by the members of such committee that there is a grave question as to the constitutionality of the provisions of the bill, the Speaker of the Assembly as chairman of such committee requests the Attorney-General to render immediately an opinion with reference to the same.

OPINION

The Rules Committee of the Assembly has before it for consideration, the Horton Civil Service Bill, printed No. 1708. There is a grave question as to its constitutionality, upon which my opinion is requested.

There is very little time afforded me to make an examination into this question, but it would seem from a hasty examination of the bill, in the light of the Constitution, that the opinion of the members of the committee as to its constitutionality is not unfounded. Judging only from the standpoint of the hasty examination which I have been able to give it, I am inclined to believe that the courts would hold this bill to be violative of the Constitution, in one or two particulars.

Section 40 of the bill, page 2, provides:

"Standard titles, duties, qualifications, grades, and rates of compensation, employments and employees in the State civil service are hereby created in accordance with the code of specifications of personal service known as 'schedule A' contained in the first report of the committee on civil service of the Senate; submitted as Senate document number forty, under date of March twenty-seventh, nineteen hundred and sixteen, which schedule shall have the force and effect of law. This schedule shall be published by the Secretary of State in

the volumes of the session laws of nineteen hundred and sixteen."

Article III, section 14 of the Constitution, provides that all bills shall have an enacting clause, and that:

"No law shall be enacted except by bill."

The report of the Civil Service Committee of the Senate, known as "schedule A," certainly does not by itself constitute a bill within the meaning of the Constitution, and therefore, cannot be separately enacted into law.

If it is to be law, it becomes such by virtue of its being made or deemed a part of this bill. It has never heretofore existed as law, and its status as such is entirely determined by the provisions of this bill. The provisions of the schedule are made essential parts of this bill, because by the terms of the bill standard titles, etc., "are hereby created in accordance with" such schedule, which seems to be of the very essence of the bill. In this respect it is unlike a reference to the Condemnation Law or to some other statute providing merely rules of procedure.

The question arises whether, if this schedule is a part of this bill, there has been conformity with section 15 of article III, which provides that:

"No bill shall be passed or become a law unless it shall have been printed and upon the desks of the members in its final form, at least three calendar legislative days prior to its final passage."

I understand that this report of the Senate committee has not been on the desks of the members in its final form at any time.

Section 17 of article III of the Constitution is a further provision which seems to be violated in spirit if not in letter, by simply referring to this schedule instead of incorporating it in the act. In cases where it may have been concluded by the courts that section 17 was not violated, it has been where the provisions in question were not made or deemed a part of the act, and where the validity of the provisions in question was derived from the fact that they had previously existed as rules and regulations which

had been adopted pursuant to law under broad powers conferred upon the authors of the provisions. This committee report is clearly made a part of this act, and since it has never existed as law heretofore, or as rules and regulations made pursuant to law, this bill cannot be deemed to simply ratify something which has previously had the force and effect of law.

I find a further provision in section 53, on page 8 of the bill, which seems to me to be clearly an improper delegation of legislative power. It provides that:

“The civil service commission shall have power to amend from time to time, the qualifications of the specifications of personal service contained in ‘schedule A.’”

If this schedule is to have the force and effect of law, it seems to me that under the recent decision of the Court of Appeals, in *People v. Klinck Packing Co.*, 214 N. Y. at pages 138-140, the Legislature cannot delegate to this commission the power to amend such law.

For the above reasons I am inclined to agree with those members of your committee who believe that there is a grave question as to the constitutionality of the main provisions of the bill.

Dated, April 20, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. THADDEUS C. SWEET, *Speaker of the Assembly, Capitol, Albany, N. Y.*

PRI~~S~~ON LAW — STATE PRISON COMMISSION — POWERS OF VISITATION.

The power of the State Commission of Prisons to visit, inspect, and investigate penal institutions of the State discussed. The power is given to the Commission as a body and not to its members as individuals.

INQUIRY

Are the powers of visitation, inspection and investigation of the penal institutions of the State vested in the State Commission of Prisons, or may they be exercised by individual members of the commission?

OPINION

The State Constitution, as adopted in 1894, contains this provision:

“A State Commission of Prisons which shall visit and inspect all institutions used for the detention of sane adults charged with or convicted of crime, or detained as witnesses or debtors.”

Pursuant to this constitutional provision the State Commission of Prisons was created by chapter 1026 of the Laws of 1895, as amended by chapter 112 of the Laws of 1901. The general powers and duties of the commission are provided for in section 46. This section provides, among other things: “The State Commission of Prisons shall visit and inspect all institutions used for the detention of sane adults charged with or convicted of crime,” etc., and section 47 of the Prison Law provides for the visitation and inspection of institutions.

It is my opinion that, under the constitutional provision and under the aforesaid sections of the Prison Law, the power of visitation and inspection is devolved upon the State Commission of Prisons as a body, and not upon the individual members of the Commission; and that individual members of the commission have only the power and right of visitation and inspection, under the Constitution and these statutes, in so far as they are authorized by due resolution of the State Commission of Prisons as an official body.

I am sustained in my position by a recent decision of the Supreme Court, in an opinion of Justice Arthur S. Tompkins, sitting in Part III of the Supreme Court, at White Plains, Westchester county, in a criminal prosecution entitled The People of the State of New York against Thomas Mott Osborne. In this prosecution the indictment charged that Mr. Osborne committed perjury while he was under examination in a proceeding instituted by Dr. Diedling under section 47 of the Prison Law. Dr. Diedling had not been authorized by the commission as an official body to carry on such investigation. Mr. Justice Tompkins directed an acquittal by the jury upon the indictment. He says in the course of his opinion (printed in the New York Times, March 16, 1916):

"There can be no perjury unless the proceeding in which the testimony is given is authorized by law. There is no proof here that Dr. Diedling was authorized by law to conduct this investigation or administer an oath. The State Prison Commission, of which Dr. Diedling is a member, is composed of seven members. It is a constitutional body having a seal of its own, with its offices in the Capitol Building at Albany, its general powers and duties are defined by section 46 of the Prison Law, and it is therein provided that the State Commission of Prisons is empowered to visit and inspect all institutions, etc. It was therefore the obvious intent of this act to vest the power of visitation and inspection in the Board or Commission of Prisons as a body, and not to give an individual member that power."

Further, he said:

"My interpretation of the language of these two sections (sections 46 and 47 of the Prison Law) is that a single member of the commission may not make an official visitation and inspection unless authorized by the commission. The act provides that said commission may prepare regulations and provide blanks and forms upon which information shall be furnished, etc., for the use of the commission. Whatever is done for the commission, and not by the commission itself, can only be done when authorized by the commission. The powers given by the Legislature were given to the commission as a body, and not to an individual member thereof. Any other intention would have been clearly stated. To construe the statute otherwise would be to vest in each member of the commission independent power and seven separate and distinct inspections and investigations of the same institution could be made at one and the same time in harmony or at discord with each other. Such power would be productive of great confusion and would seriously interfere with the orderly conduct of the business of the commission."

I commend the entire opinion to your attention.

Dated, April 27, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. JOHN F. TREMAIN, *Secretary, State Commission of Prisons, Albany, N. Y.*

MILITARY CAMP — ESTABLISHMENT OF ON LANDS OWNED BY THE STATE AND ACQUIRED FOR OTHER PURPOSES.

The board of managers of the State Industrial Farm Colony, having under its control certain lands owned by the State, known as the Beekman site, has the power to authorize the military authorities of the State to use these lands temporarily for military camp and mobilization purposes.

INQUIRY

The Adjutant-General desires to be informed whether the Board of Managers of the State Industrial Farm Colony can legally grant the temporary use of lands owned by the State at Beekman to the Armory Commission of the State for military camp purposes, and if such permission is granted whether the establishment of a military camp upon such premises, by command of the Governor, prior to the approval by the Governor of a proposed act entitled "An act making an appropriation for the mobilization, encampment and field exercise of the National Guard of the State," would bring such camp within the provisions of said proposed act and make available the appropriation therein provided for the mobilization of the Guard, at the military camp thus established.

OPINION

In reference to the subject of the mobilization of the National Guard under the act appropriating \$500,000 therefor, I note that it is your purpose if it can be legally accomplished to provide for the mobilization of the National Guard upon the lands owned by the State and under the control of the board of managers of the Industrial Farm Colony.

The site for this farm colony was acquired by such board of managers and the board of managers itself was created under the authority of chapter 812 of the Laws of 1911. The powers of the

board of managers are not specifically defined except that "the board's control of the said colony shall include among other things: (a) the election of the officers of said board; (b) the appointment of a superintendent and such other employees as the said board shall deem proper; (c) the establishment and alteration of rules and regulations for the management of the said colony, including the classification, parole, discharge and retaking of inmates and a system of compensation and credits by marks or otherwise."

Section 3 of said act required the board to ascertain whether any lands then owned by the State were suitable for use as a site for such farm and industrial colony and available therefor. In case no lands then owned by the State were found to be suitable, the board of managers was authorized to select a site of not less than five hundred acres and enter into options for the purchase thereof at not to exceed \$60,000 and report thereon to the Legislature on or before March 1st, 1912.

Without going into the entire history of the transaction, it is sufficient to say that a site was acquired by the board of managers and known as the Beekman site, and title to such property I am advised is now in the State. Such lands have never been used. No buildings have been erected thereon and the policy of the State as to the establishment of such farm colony has either been altered or its accomplishment deferred. Such lands are vacant and unused and as you have been advised and as you have advised me, the site so owned by the State is highly desirable for the mobilization purposes of the National Guard. The board of managers are the trustees of the State for the benefit of the State. Their powers are those of trustees except as restricted by the act. There is no restriction in the act which would prevent, in my opinion, the granting by the board of managers to the military establishment of the State the right to use these lands temporarily for military camp and mobilization purposes.

I have no hesitation, therefore, in advising you that as the use of this land will accomplish a very substantial saving for the State you will be justified in establishing a military camp upon this land provided that you first obtain from the board of managers the written authority so to do.

This authorization from the board of managers should be obtained promptly. The Governor should be advised of the fact that it has been obtained and he should thereupon, by executive or other proper order, declare it to be a military camp; and this should be accomplished before the approval by the Governor of Assembly Bill 1989, introduced by Assemblyman Kincaid, now pending before the Governor awaiting executive action thereon. If this program shall be carried out, I have no doubt in my mind as to the legality of the entire transaction and that it will meet the requirements of the provisions of the Assembly bill above mentioned.

Dated, May 16, 1916.

E. E. WOODBURY,
Attorney-General.

To the ADJUTANT-GENERAL.

BANKING LAW, § 260—ELIGIBILITY TO HOLD OFFICE OF SAVINGS BANK TRUSTEE.

Under §260 of the Banking Law, which provides that a person shall not be a trustee of a savings bank "if he is not a resident of this State," a person who votes in Connecticut, but from eight to eleven months actually lives in New York City, and for twelve months maintains therein a regular place of business and claims such city as his principal residence, is not a "resident of this State" within the meaning of this section and is ineligible to hold the office of savings bank trustee.

INQUIRY

Is a person who has a voting residence in the State of Connecticut, maintains a regular place of business within the city of New York during the entire year and actually lives in said city from eight to eleven months of the year, eligible to hold the office of trustee of a savings bank.

OPINION

The facts are as follows:

"One of the trustees so voting is a trustee living in New York city and an inhabitant thereof for eleven months yearly, maintains his family home there twelve (12) months yearly, has a place for the regular daily transaction of business in person therein for twelve (12) months in the year at which he is regularly in attendance (except for vacation), is a native

of New York State, has his matrimonial domicil therein, and claims New York as his home and principal place of residence, it being stated that such is his intention and choice.

Another of the trustees so voting is a trustee living in New York city, and an inhabitant thereof for eight (8) months yearly, is a householder therein for twelve (12) months yearly, has a place at which he is regularly in attendance for the regular daily transaction of business in person therein for twelve (12) months in the year (except for vacation), is a freeholder owning real estate therein, is a native of New York City, has his matrimonial domicile therein, and claims New York as his home and principal place of residence, it being stated that such is his intention and choice."

We are of the opinion that the word "resident" implies that the trustee shall have a "domicile," that is a place at which the trustee lives "with intent to make it a fixed and permanent home." (Matter of Newcomb, 192 N. Y. 238, 250.) It can hardly be said that a person who exercises his political rights in Connecticut thereby declaring his allegiance to that State considers New York State his *home* State.

Section 230 of the Banking Law, dealing with the incorporation of savings banks, provides that the incorporators "must be citizens of the United States at least four-fifths of them must be residents of this State, and at least two-thirds of them must be residents of the county where the business of the savings bank is to be transacted."

The introductory provision in section 230, that an incorporator, and therefore a trustee, shall be a citizen of the United States connotes that the next following provision, namely, that he shall be a resident of the State, means that he shall be a citizen of New York or at least that he be "domiciled" in the State, i. e., living here with the intent to make it his *fixed* and permanent home.

A savings bank, like all other corporations, is created by the State and the privilege of doing business in that form is a right or favor conferred by the government, not belonging to persons in general. As it would seem incongruous that the State of New York should create a corporation at the sole request and for the

benefit alone of citizens of other States, it has been provided in different sections throughout our corporation laws that a certain percentage of the incorporators shall be residents of this State, which we feel justified in construing means that they shall be citizens of this State or at least persons who have chosen New York State as their home to the exclusion of a fixed home in another State.

As was said in *People v. Platt*, 117 N. Y. at page 167:

“in all cases where a statute prescribes ‘residence’ as a qualification for the *enjoyment of a privilege* or the exercise of a franchise, the word is equivalent to the place of domicile of the person who claims its benefit.”

In *Crawford v. Wilson*, 4 Barb. 505, it was also said:

“The terms ‘legal residence’ or ‘inhabitancy,’ and ‘domicile’ mean the same thing. By legal residence, I mean the place of a man’s fixed habitation; where his political rights, such as the right of the elective franchise, are to be exercised.”

And in *Cincinnati H. & D. R. Co. v. Ives*, 3 N. Y. Supp. 895:

“In statutes relating to taxation, settlements, rights of suffrage, and *qualifications for office*, it may have a very different construction from that which belongs to it in statutes relating to attachments. In the latter, actual residence is contemplated, as distinguished from legal residence.”

(See also *Board of Education v. Crill*, 73 Misc. 742.)

As an additional argument that section 230 and therefore section 260 of the Banking Law has required that a trustee of a savings bank be a citizen of this State or at least domiciled therein, we call attention to the fact that no foreign savings bank (that is, one incorporated and supposedly managed by citizens or residents of another State) can be licensed under our laws to do business in this State, and therefore we must construe strictly the section which seeks to bar out as trustees of New York savings banks residents or citizens of another State.

The persons referred to in your letter are not citizens of New York State or persons domiciled therein since they have not the right to participate in its governmental affairs and have not chosen New York State as their *fixed and permanent home*; and we conclude they are ineligible to hold the office of savings bank trustees.

Dated, May 18, 1916.

E. E. WOODBURY,

Attorney-General.

To Hon. EUGENE LAMB RICHARDS, *Superintendent of Banks, Albany, N. Y.*

STATE FINANCE LAW, § 36, AS AMENDED BY CHAP. 392 OF THE LAWS OF 1916,
RELATING TO THE PURCHASE OR RENTING OF AUTOMOBILES.

Automobiles may be rented any number of times by any particular department, officer, board or commission when the same are required for their official work, not exceeding, however, more than ten days at any one time, but claims for rent of an automobile based upon slight official business as an excuse for a junket should not be allowed, and claims for the rent of such vehicles should only be allowed where the official work was necessary and imperative and the best interests of the state were thereby promoted.

INQUIRY

Does the provision of the State Finance Law, as amended by chapter 392 of the Laws of 1916, amending section 36 and providing that the Comptroller shall not audit any claims for the rents of an automobile, intended primarily for the carrying of passengers, for a period of longer than ten days unless moneys are specifically appropriated therefor, contemplate that said period of ten days is to be construed (1) as the aggregate amount against said appropriation, or (2) for one person in a department, institution, board or commission, or (3) as a permission to rent an automobile for ten days at a time, or (4) for the renting by various persons not exceeding ten days in the aggregate for any period.

OPINION

The amendment prohibits the Comptroller from auditing any claim or account for the rent of an automobile intended primarily for the carrying of passengers for a period longer than ten days, unless moneys are specifically appropriated therefor.

This language, coupled as it is with the purchase of automobiles by State departments, boards, etc., is quite ambiguous and renders construction thereof somewhat difficult, but I think it was the intention of the Legislature to prevent the long and continuous renting of an automobile by public departments, officers, boards, etc., and that it was deemed best to limit such renting to a period not exceeding ten days at any one time, but does not limit the number of times that a particular department, officer, board or commission may hire automobiles which are necessary for use in the discharge of their public duties.

I am also of the opinion that it was the legislative intent to impose upon the Comptroller the responsibility of checking abuses, if any should be attempted, in the leasing of automobiles to the various State officers, boards, and departments for long periods of time, and is an administrative function with which he is charged, which should be exercised in a reasonable manner, and while the claims for the leasing of automobiles may be allowed for any number of times, not exceeding ten days, which the duties of the claimants' position seem to require, I do not think the Comptroller is bound to audit claims for the use of such vehicles, even for periods of less than ten days, where he is satisfied that such use was not demanded by the necessities of the work in hand. In other words, I think it was the intention of the Legislature by such amendment to clothe the Comptroller with the power to allow all claims for the use of automobiles, for periods not exceeding ten days at a time, that he is satisfied are honest and legitimate charges for the good of the public service, but should reject all claims that appear to have been incurred for the pleasure or private purposes of the claimant, based upon some slight official business as an excuse for the junket. It calls for the exercise of judgment and discretion on the part of the Comptroller as to the necessity for the incurring of the expense as well as a fair allowance for all such expenditures that were made for the best interest of the State.

The amendment, as it is phrased, is susceptible of different interpretations and it is incumbent upon public officers to endeavor to obtain the true intent of the Legislature, and to administer it according to the spirit of the act, so as to prevent evasion and abuse of the statute, and at the same time to allow all reasonable

renting of automobiles, not to exceed a period of ten days at a time, as the necessities for such use may arise. I cannot, under the circumstances, lay down any cast iron rule that should be applied to all claims, but the Comptroller must be guided in each instance by what appears to him to be the highest and best interests of the State.

Dated, May 24, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. EUGENE M. TRAVIS, *State Comptroller, Albany, N. Y.*

SARATOGA SPRINGS STATE RESERVATION — INVESTMENT OF COMPTROLLER'S
TRUST FUNDS IN APPROPRIATION JUDGMENTS — PAYMENT OF APPROPRIA-
TION JUDGMENTS — CHAPTER 569, LAWS OF 1909 — STATE FINANCE LAW,
§ 81—NEW YORK STATE CONSTITUTION, ARTICLE VII, § 2; ARTICLE IX, § 3.

The Comptroller may pay judgments of the Court of Claims for property appropriated for the State Reservation at Saratoga out of any balance of proceeds received from the sale of bonds issued for the Reservation. Investment of trust funds in his care in such judgments of the Court of Claims is always limited by the constitutional provision that the outstanding unsecured State debt shall never exceed \$1,000,000.

INQUIRY

Has the State Comptroller authority to apply a balance in the State Treasury obtained for the sale of Saratoga Springs State Reservation bonds to the payment of any portion of judgments against the State in the Court of Claims for property taken by the State for such reservation or could the Comptroller invest trust funds under his supervision in such judgments of the Court of Claims.

OPINION

By the original act creating the State Reservation at Saratoga (chapter 569, Laws of 1909), an issue of \$600,000 of bonds was authorized for the purchase of lands, rights and easements and for "the payment of any judgments that may be recovered therefor in the Court of Claims." The same language quoted appears in chapter 394 of the Laws of 1911, which amended the Act of 1909 and authorized bonds to the amount of \$950,000 for the reservation instead of \$600,000. An additional issue of \$235,000

was authorized by chapter 252 of the Laws of 1911, and among the purposes for which the proceeds were to be used was again included "the payment of any judgments that may be recovered" in the Court of Claims for lands or property taken. Chapter 335 of the Laws of 1915 authorized \$99,000 more of bonds for the same purposes as set forth in the preceding acts. The total issue of bonds has therefore been \$1,284,000.

Under the Act of 1911, \$950,000 of bonds were issued payable serially \$95,000 each year out of moneys to be appropriated each year by the Legislature. Four have been paid aggregating \$380,000 (chapter 111, Laws of 1912; chapter 674, Laws of 1913; chapter 177, Laws of 1914; chapter 687, Laws of 1915), leaving the total amount of outstanding bonds at the present time \$904,000. The total payments made on account of acquisitions and expenditures for the Reservation from the proceeds of the sale of bonds have amounted to \$1,190,563.03, leaving a balance, as before stated, of \$93,436.97 in the treasury.

You state that the Court of Claims has rendered judgment in one instance for \$215,000 for lands taken, and that another judgment of \$30,956.17 has actually been presented to the Comptroller for payment. Other claims aggregating several hundred thousand dollars are pending in the Court of Claims.

As each act providing for the issue of bonds has specifically recited that the proceeds are, among other objects, to be used for the payment of judgments of the Court of Claims, I can see no legal obstacle to your applying the balance now in your hands to that purpose, and in fact I am of the opinion that you could be compelled so to do by mandamus. No doubt, however, the funds now on hand will be needed for the maintenance and improvement expenses this current year for the reservation, and it would seem advisable to induce the owner of the judgment, if possible, to await a substantial appropriation by the Legislature for the payment of judgments of the Court of Claims.

To the suggestion that trust funds under the supervision of the Comptroller might perhaps be invested in these judgments of the Court of Claims, I reply in accord with your interpretation of the law, i. e., that any use of these trust funds to pay judgments of the Court of Claims will constitute a borrowing of the moneys in

those funds and will result in the creation of a State debt (unsecured), the sum total of which cannot at any time exceed \$1,000,000.

Article VII, section 2 of the State Constitution provides:

“ § 2. STATE DEBTS, POWER TO CONTRACT. The State may, to meet casual deficits or failures in revenues, or for expenses not provided for, contract debts; but such debts, direct or contingent, singly or in the aggregate, shall not at any time exceed one million of dollars; and the moneys arising from the *loans creating such debts* shall be applied to the purpose for which they were obtained, or to repay the debt so contracted, and to no other purpose whatever.”

Article IX, section 3 of the Constitution provides:

“ § 3. COMMON SCHOOL LITERATURE AND THE UNITED STATES DEPOSIT FUNDS. The capital of the common school fund, the capital of the literature fund, and the capital of the United States deposit fund, *shall be respectively preserved inviolate*. The revenue of the said common school fund shall be applied to the support of common schools; the revenue of the said literature fund shall be applied to the support of academies; and the sum of twenty-five thousand dollars of the revenues of the United States deposit fund shall each year be appropriated to and made part of the capital of the said common school fund.”

The last above provision declares that the capital of the funds shall remain inviolate, which means that the capital shall not be expended for any purpose. Therefore the State can secure the use of the capital of those funds only by borrowing therefrom as it would in the open market, which effects a loan and creates a debt within the purview of article VII, section 2 above.

It follows that under the power given the State Comptroller in section 81 of the State Finance Law to invest these trust funds “in the judgments or awards of the Court of Claims of the State,”

the Comptroller is at all times limited to a borrowing which will not increase the outstanding unsecured State debt above \$1,000,000.

Dated, June 9, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. EUGENE M. TRAVIS, *State Comptroller, Albany, N. Y.*

COMMISSIONER OF EDUCATION — DETERMINATION OF LEGALITY OF ELECTION OR APPOINTMENT OF SCHOOL DIRECTORS — EDUCATION LAW, §§ 398 AND 880.

The Commissioner of Education has authority under the Education Law, §§ 398 and 880, to determine upon appeal to him the legality of election or appointment of school directors.

INQUIRY

Has the Commissioner of Education jurisdiction to determine the legality of the election or appointment of school directors upon an appeal to him?

OPINION

The sole function of the school directors as prescribed by the Education Law seems to be to constitute a board of school directors for the purpose of electing a district superintendent of schools.

Section 398 of the Education Law provides that all questions in controversy relating to the election of a district superintendent shall be determined by the Commissioner of Education on proper appeal.

If the question of what persons are entitled to a vote on the board of school directors for a district superintendent arises, it would seem to me to be a question in controversy "relating to the election of such district superintendent" within the meaning of section 398. That section provides that the provisions of article "fourteen" shall apply to and govern such appeals but this unquestionably refers to article thirty-four which in the Education Law of 1909 was article fourteen and in the Law of 1910, was transferred and made article thirty-four.

By section 880 of article thirty-four it is further provided that the Commissioner of Education shall have the right to examine and

decide an appeal or petition by any person conceiving himself aggrieved in consequence of any action * * * "subdivision 7, by any other official act or decision of any officer, school authorities or meetings concerning any other matter under this chapter or any other act pertaining to common schools."

Under this broad provision, it seems to me that the jurisdiction of the Commissioner of Education is likewise made clear in such matters as you suggest. The election of school directors is provided for in the Education Law and appointments to fill vacancies in the office of school directors is likewise provided for in the Education Law. I, therefore, am of the opinion that an appeal will lie to the Commissioner of Education to contest the legality of the election or appointment of school directors.

Dated, June 12, 1916.

E. E. WOODBURY,
Attorney-General.

To Dr. THOMAS E. FINEGAN, *Deputy Commissioner of Education,*
Education Building, Albany, N. Y.

INVESTMENTS FOR SAVINGS BANKS — BOND AND MORTGAGE OF LODGE OF
F. & A. M.—BENEVOLENT ORDERS LAW, § 2 — CHAPTER 467, LAWS OF
1906 — BANKING LAW, § 239.

A bond and mortgage issued by a Benevolent Order since 1906, if issued without the intervention of a trustee, is a lawful investment for savings banks in this State.

INQUIRY

Has a savings bank authority to invest in bonds and mortgages issued by benevolent orders?

OPINION

I refer to your letter of June 29th which presents a question with regard to the power of a savings bank to invest in bonds and mortgages issued by trustees of benevolent orders. When Attorney-General Davies' opinion was rendered in 1902 (Opinions, p. 245) the trustees of such orders could mortgage the property held by them only *to a trustee or trustees* for the purpose of securing the bonds or certificates of indebtedness issued by them. In 1906

by chapter 467 the trustees of such orders were authorized to mortgage the property without the intervention of a trustee. Accordingly I think the bonds and mortgages issued by trustees of benevolent orders, if complying with the provisions of subdivision 6 of section 239 of the Banking Law, are lawful investments for savings banks of this State.

Dated, July 13, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. EUGENE LAMB RICHARDS, *Superintendent of Banks,*
Albany, N. Y.

PUBLIC HEALTH LAW — MOBILIZATION OF MILITIA AT CAMP WHITMAN.

Powers of the Commissioner of Health to prevent nuisances at any time.

INQUIRY

The Department of Health requests an opinion as to whether:

First. It has the power to enact rules and regulations to require vendors to abandon the sale of food products at stores in the neighborhood of Camp Whitman.

Second. Have the military authorities power to require such vendors to vacate said stores and vending places, they being situated on private property?

Third. Has the commanding officer power to forbid soldiers visiting these vendors and purchasing food products from them?

Fourth. Has the Department of Health power to enact rules and regulations for sanitary control of such places?

Fifth. Has the local board of health authority to enact sanitary ordinances so that these places would be maintained in a sanitary condition?

You put five questions relative to food vendors near Camp Whitman which I shall answer in the order set forth in your communication.

(1) Your department has not the power to enact rules and regulations which would have the force and effect of law to require these vendors to abandon the sale of food products.

(2) The military authorities at the camp have not the absolute power to require these vendors to vacate their stands when situated upon private property and not upon property owned by the State.

(3) It would seem the commanding officer has authority under the Military Law and rules and regulations to forbid the soldiers endangering their health by purchasing food from such vendors.

(4) It would be best for your department to suggest to the local health authorities rules and regulations for the sanitary control of such places. Then, if properly enacted by the local authorities they could be enforced as provided under the Public Health Law.

(5) My answer to the fourth question of course includes my answer to the fifth.

Dated, July 17th, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. LINSLY R. WILLIAMS, *Deputy Health Commissioner,*
Department of Health, Albany, N. Y.

LABOR LAW, SECTION 3 — TUG BOAT — EIGHT-HOUR LAW.

Tug boat men employed for twelve hours in various employments violate the eight-hour law, where a part of this time is given for the State.

INQUIRY

Is the employment of a crew upon a tug boat engaged upon a Barge canal terminal contract which is subject to call at any time during a period of twelve hours, from 6 A. M. to 6 P. M., although the time actually occupied in such employment may not exceed five hours, a violation of the eight-hour law.

OPINION

In letters addressed to the Superintendent of Public Works dated respectively April 21 and July 20, 1915, application of the eight-hour law (section 3 of the Labor Law) to the operation of tug boats was considered. We there came to the conclusion that the eight-hour law applied to employees working on tug boats. I can see no reason why the law should not equally apply to employees working on dredges.

I make little question that the Burgard Company is absolutely prohibited under section 3 from employing their tug boat and dredge men in a continuous shift of more than eight hours while doing Barge canal terminal work. However, the situation disclosed in the report submitted indicates that the men are employed only a part of the time, probably less than eight hours during the day, in State employment, from 6 A. M. to 6 P. M.

In my opinion this does not alter the case. The eight-hour law is to a certain extent a police power measure, passed to conserve the health, safety and comfort of persons employed by the State. The courts have denied the necessity is so great that the Legislature may pass a statute forbidding private employers from entering into contracts for the employment of servants for more than eight hours a day, although the Court of Appeals has recently recognized the power of the Legislature to restrict the hours of employment of women. Under the Constitution, as amended, power has now been given to the Legislature to control the hours of labor of persons employed by the State directly.

There being no question then of the validity of the provision in the State contract as to the hours of labor or of the prohibition against varying these by any special contract, except in cases of extraordinary emergency, etc., we may examine the reason for the rule, and determine whether or not persons may be employed twelve hours a day, and by giving only a part of their time, or eight hours, to the State avoid the prohibition of the statute.

The purpose of the law being, as stated above, to conserve the health, safety and comfort of employees of the State, it is clear that the legislative intention is directly violated by permitting the employment of men who are required to work four hours longer in private employment. The very spirit of the provision of the statute, as inserted in the contract, requires that not only shall the employees be protected from any such imposition by the contractor, but that even willingly they shall not be permitted to extend their time of labor by special agreement.

Perhaps if the work done after hours were of a different kind we would not be able to control the situation. However, in this case we have the men employed continuously for twelve hours on

the same boats and in work for private persons and for the State of substantially similar character.

It further appears that while the towing actually required each day could be done in five hours, nevertheless, the men are subject to call for towing any time between 6 A. M. and 6 P. M. Under these circumstances, the fact that seven hours of their time is given to other employment than that of the State, seems to me immaterial.

I have not disregarded the point that the master of the tug has a Federal license permitting him to do lake and harbor towing from 6 A. M. to 6 P. M.; but the State may make its own choice of methods of employment, and having made this choice, by directing through solemn mandate of the Legislature, that laborers, workmen or mechanics shall not be permitted or required to work more than eight hours in any day, the permission of the Federal government does not interfere with the agreement made between the State and its own contractor.

In concluding, let me emphasize that this letter is based on the assumption that the dredge and tug are available for use of the State contractor at any time between 6 A. M. and 6 P. M., and that, in practice, the dredge and tug have been actually used by the State contractor up to 6 P. M.

Dated, July 25, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. V. T. HOLLAND, Assistant Secretary, Department of
Labor, State Industrial Commission, Albany, N. Y.

BARGE CANAL CONTRACTS — LETTING TO LOWEST BIDDER — CONSTITUTION ART. VII, § 9 — BARGE CANAL LAW (L. 1903, CHAP. 147, § 7) — CANAL LAW, § 144.

Under Art. VII, § 9, of the State Constitution and the provisions of the Barge Canal Law (L. 1903, Chap. 147, § 7) Barge Canal contracts must be let to the lowest bidder who furnishes the required security. It seems, however, that in a clear case of unfitness of a contractor to perform a given work as demonstrated by experience the Superintendent of Public Works might be justified in refusing his bid.

INQUIRY

Has the Superintendent of Public Works authority to decline to receive a bid from a person with whom the department has had unsatisfactory experience in similar contract work?

OPINION

Section 9 of article VII of the Constitution provides that:

"All contracts for work or materials on any canal shall be made with the persons who shall offer to do or provide the same at the lowest price, with adequate security for their performance."

As I understand it, this provision was inserted for the purpose of defeating the practice which it was claimed had grown up and which occasioned great scandal, of rejecting low bids for one reason or another and awarding contracts to higher bidders acting in collusion with other bidders. Apparently the intent was to insure a discontinuance of the practice by peremptorily requiring the letting of the contract to the lowest bidder who should furnish adequate security.

The provisions of the Barge Canal Law (chapter 147, Laws of 1903) with respect to the letting of contracts are in accordance with the aforesaid constitutional provision.

Section 7, after providing that:

"The Superintendent of Public Works may reject all the bids and readvertise and award the contract in the manner herein provided, whenever in his judgments the interests of the State will be enhanced thereby,"

provides that:

"The contract * * * shall be made with the person, firm or corporation who shall offer to do and perform the same at the lowest price and who shall give adequate security for the faithful and complete performance of the contract * * *."

This provision for security was made so as to indemnify the State in the event that the contractor for any reason failed to fulfill his contract. In other words, it was adopted to afford the State protection under such circumstances as your communication assumes.

Construing together the aforesaid constitutional and Barge Canal Law provisions, I feel forced to conclude that the lowest

bidder, provided he furnishes the security required by the statute, is as a matter of law entitled to be awarded the contract.

To hold otherwise would not only open the door to practices such as the aforesaid constitutional provision meant to prohibit, but would be equivalent to construing the statute to provide that the contract be let to the lowest *responsible* bidder, which manifestly was not the statutory intent.

If the experience with a contractor in connection with other contracts has been such as to make it clear that he is unfit or unable to perform a given work, you might be justified in refusing to consider his bid; but I think that it would require an exceptional state of facts to justify such action and that generally speaking the contract must be let to the lowest bidder who furnishes the required security.

Dated, July 31, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. W. W. WOTHERSPOON, *Superintendent of Public Works,*
Albany, N. Y.

MILITARY LAW, §§ 30 AND 120 — DEPOT UNITS.

The Governor is clothed with power to direct the organization of as many depot units as appears to be necessary in advance of the entry of the several military organizations into the actual service of the United States, which units should continue only during the time the regular organizations are absent in the actual service.

INQUIRY

Does the Military Law contemplate or authorize the organization of depot units in advance of the entry of an organization into the actual service of the United States only when a situation arises which, in the opinion of the government, makes it probable that the organization from which the depot unit is to be formed will be called into the service of the United States.

OPINION

On August 4th there was an opinion rendered by my department to the Armory Commission which touched the subject of depot

units and battalions, which I assume you have seen; if not, I will be pleased to send you a copy of the same; but your inquiry calls for the consideration of other points in relation to such units which were not discussed in the former letter.

I think it is quite evident that the Legislature intended by the enactment of chapter 287 of the Laws of 1915 (being an amendment to section 120 of the Military Law), to clothe the Governor with power to organize as many depot units as would appear to be necessary in advance of the entry of the several military organizations into the actual service of the United States, and that such service of members of the depot units should continue only during the time the regular military organizations were or are absent in the actual service of the United States, "and only during such period," and if any depot units have been organized to take the places of the regular organizations which have been called into the actual service of the United States, and such regular organizations have been mustered out of such United States service and returned to their respective armories, the necessity for a continuance of the depot units has ceased to exist, and the members thereof will return to the reserve lists or positions to which they respectively occupied before the formation of such units, and in the case of newly enlisted men to serve in such units, they can become members of the regular respective organizations for which they were raised to take the places of during the absence of such organizations in the United States service.

The section is somewhat ambiguous, as the last part of the third paragraph reads "except that officers and non-commissioned officers of depot units shall have authority to exercise command in their respective units," but I do not think the Legislature intended there should be duplication of officers by retaining those which were mustered in or commissioned for service in the depot units after the return of the regular officers, as such a condition would only create confusion and clashing of authority, but I think the more reasonable interpretation of the words last above quoted is that such words were intended to continue the exercise of the

officers' authority in the depot units until the members of such units were restored to or taken into the parent company.

Dated, August 23, 1916.

E. E. WOODBURY,

Attorney-General.

To Hon. CHAUNCEY P. WILLIAMS, *Acting Adjutant-General,*
Albany, N. Y.

ELECTION LAW — FILING OF DESIGNATING PETITIONS.

A petition designating a candidate for office to be voted for at a primary, which is deposited in the post office on the last day upon which such a petition could be filed, contained in a postpaid wrapper addressed to the officer with whom said petition is required by law to be filed, and although not received by him until the following day, should be received by such officer.

INQUIRY

Can a petition for designation of Member of Assembly mailed at 7 p. m. on the last day for filing said petition and received by the Commissioners of Elections upon the following morning be received and filed by them.

OPINION

In reply to your inquiry of the 23rd inst. I beg to advise you that Mr. Justice Rudd of the Supreme Court, sitting at special term on September 16, 1914, in a proceeding entitled *In the Matter of Thomas F. Conway*, directed the Secretary of State to receive and place on file a petition mailed at the city of Ogdensburg on the evening of September 8, the last day for filing petitions for nominations with such secretary, and to print upon the official ballot for use at the primary election the name of the person appearing upon such petition as a candidate for delegate-at-large to the Constitutional Convention.

The moving papers showed that the petitioner delivered the verified petition to the post office clerk at Ogdensburg at about 4 p. m. of the last day upon which petitions could be filed, and the post office clerk who received it, in his affidavit stated that such envelope containing such petitions left the post office in due course of mail at 7:25 of the same day. They were received at the office of the Secretary of State on the following morning. The Secretary

refused to file them and the proceeding was commenced for the purpose of compelling him to file them, and the order above referred to was the result of such application. This case has never been reported so far as I can discover, but I have no doubt that it establishes a precedent which at least is sufficient to justify you in accepting and filing a petition for designation of Member of Assembly mailed and stamped at 7 p. m. on August 22nd and received by the Commissioners of Election at 9 a. m. on August 23rd.

Dated, August 24, 1916.

E. E. WOODBURY,
Attorney-General.

To DANIEL KENT, *Esq., Commissioner, Carmel, N. Y.*

ELECTION LAW, §§ 331 AND 503 — SOLDIERS AND SAILORS BALLOTS.

The names of all officers to be voted for, including presidential electors, should be placed on one ballot and a separate ballot provided for constitutional amendments and questions submitted.

INQUIRY

What ballots will it be necessary for the Secretary of State to furnish for the use of soldiers in the field in the general election of 1916?

OPINION

Regarding the form of ballots to be provided for the soldiers and sailors' elections, I have the honor to advise you as follows:

In my opinion, you should provide one officers' ballot upon which should be printed the titles of all offices for which any voter may vote including the presidential electors.

Section 503 of the Election Law provides, among other things, as follows:

“ All ballots shall be uniform in size and style of type used and shall contain the titles of all offices, as near as may be, for which any voter may vote in any election district of the State at such election.”

The language above quoted seems to be inconsistent with the suggestion that a separate ballot for presidential electors should be provided. In the broad sense in which the word "offices" is used in the statute, it would seem to include presidential electors (see Federal Constitution, article II, section 1, paragraph 2; XIVth amendment to Federal Constitution, section 3; Election Law, sections 331, 54 and 451). Section 54 of the Election Law above referred to specifically provides for the nomination of "candidates for the *office* of elector for President and Vice-President of the United States."

Your inquiry with reference to the form of ballot to be provided for constitutional amendments and questions submitted is answered by section 504 of the Election Law in the following language:

"If at such election any proposed amendment to the Constitution or other proposition or question is to be submitted to the vote of the voters of the State, the Secretary of State shall furnish an equal number of ballots for questions so submitted in the form prescribed by section 332 of this chapter, which shall be properly endorsed, as a war ballot."

Dated, August 28th, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. FRANCIS M. HUGO, *Secretary of State, Albany, N. Y.*

NATIONAL GUARDSMEN IN SERVICE OF FEDERAL GOVERNMENT — NOT ENTITLED TO STATE PAY — NEW YORK MILITARY LAW, § 210.

National guardsmen while in the service of the Federal government along the Mexican border under call of the President of the United States are not "ordered for duty by the Governor" under § 210 of the Military Law and therefore are not entitled to State pay while so in the service of the Federal government.

INQUIRY

Are New York National Guardsmen in service for the Federal government along the Mexican border entitled to pay from the State of New York in addition to the pay received from the United States government?

OPINION

Section 210 of the Military Law provides:

"Each officer and enlisted man *ordered for duty by the Governor* or under his authority by the major-general or the commanding officer of the naval militia shall receive the pay herein specified for every day actually on duty except when so ordered for inspection, muster, small arms practice, parade or review or field service not extending beyond one day; a private or a second-class private, a musician or a trumpeter, one dollar and twenty-five cents; * * *."

While it is true that the enlisted guardsmen were in one sense "ordered for duty by the Governor" following the call of the President, they were in law ordered out by the President under the Constitution and laws of the United States pursuant to the following provision of the Federal statutes:

"Whenever the United States is invaded, or in danger of invasion from any foreign nation, or of rebellion against the authority of the government of the United States, or the President is unable with the regular forces at his command to execute the laws of the Union, it shall be lawful for the President to call forth such number of the militia of the State or of the States or territories or of the District of Columbia as he may deem necessary to repel such invasion, suppress such rebellion, or to enable him to execute such laws, and to issue his orders for that purpose, through the Governor of the respective State or territory, or through the commanding general of the militia of the District of Columbia, from which State, territory or District, such troops may be called, to such officers of the militia as he may think proper. (35 Stat. 400.)"

Furthermore it is readily demonstrable that although the words "ordered for duty by the Governor" in section 210 of our Military Law may, upon first observation, lend themselves to an interpretation which would give to the militiamen State pay in the present situation, the words do not upon more extended examination seem

to sanction State pay of militiamen except when they are *ordered for State service by the Governor.*

We are not aided by any precedents of the Civil or Spanish war. By chapter 477 of the Laws of 1862, section 173, it was provided that:

“The military forces of this State, *when in the actual service of the State* in time of war, insurrection, invasion, or imminent danger thereof, shall, during their time of service, be entitled to the same pay, rations and allowances for clothing as are or may hereafter be established by law for the army of the United States.”

The above law was in effect when President Lincoln called out the New York State Militiamen in the early years of the war, and many of the companies thereafter became volunteers in the United States army, so that both under the language of the statute and from the fact that the men entered the United States army as volunteers, no State pay was received by them while in the service of the Federal government.

The statute remained substantially in the same form until the enactment of chapter 299 of the Laws of 1883, which repealed the former statute and provided as follows (section 92):

“There shall be paid to such officers and enlisted men as shall be ordered for duty by the commander-in-chief in pursuance of the provisions of this act, the following sum each, for every day actually on duty:

“To all musicians and privates, one dollar and twenty-five cents * * *.”

After several mesne amendments of no moment chapter 212 of the Laws of 1898 presented the law with respect to the pay of militiamen in the following form (section 151):

“Each officer and enlisted man *ordered for duty by the Governor*, or under his authority, by the commanding officer of the National Guard or the commanding officer of the Naval Militia, shall receive the duty pay herein specified for every day actually on duty, except when so ordered for inspection, muster or rifle practice, or parade or review or field service

not extending beyond one day; a musician or private, one dollar and twenty-five cents * * *."

The above is, except for minor changes, the same language as is now contained in section 210 of the Military Law hereinbefore first referred to. No interpretation of the section occurred in 1898 for the reason that the militiamen entered the United States army during the Spanish war as volunteers and did not serve as State militiamen under call of the President.

The change in the statute made in 1883 (from "when in the military service of the State" to when "ordered for duty by the commander-in-chief") does not impress me as intending to alter the rule with respect to the pay of the militia, that is, the amendment was not intended to secure for the militia State pay while engaged in the service of the Federal government. The new phrase was used rather to contradistinguish service for the State *under order of the Governor* from service for a county or city "pursuant to the *order of the sheriff*," "or for the mayor" in case of riot, tumult, breach of the peace, etc., under which latter conditions the county and not the State was obliged to meet the compensation of the militia at the same rate as was provided for State service (section 95, chapter 299, Laws of 1883, now section 211 of the Military Law).

The above conclusion seems the correct one especially in view of the fact that the statute of 1883, which altered the language to make it read when "ordered for duty by the commander-in-chief," repealed at the same time section 168 of an act of 1870 (chapter 80), which provided State pay to officers of the militia for certain limited duties "*while in the service of the United States*." Section 168 read as follows:

"In case of war, insurrection, rebellion or invasion, or imminent danger thereof, when the military forces or volunteers of the State of New York, or any part thereof, shall be in the actual service of the State, *or in the service of the United States*, the staff of the Commander-in-Chief, while on duty, the assistants in the several departments, and such other officers as may be detailed by the Commander-in-Chief for the performance of any duties connected with the recruiting,

mustering, enrolling, equipping, arming, organizing, paying, inspecting, providing and administering justice for such forces and volunteers, shall, in lieu of all other allowances under this act, be paid such reasonable and just compensation, not exceeding the full pay and allowances of officers of the same rank in the army of the United States, as the Commander-in-Chief shall deem proper, together with their necessary expenses and those of their departments, to be paid by the State upon the certificate of the Commander-in-Chief showing a detailed statement of such services and expenses."

A further observation may be made. It would appear incongruous that the State should purpose to pay the militiamen from the State treasury while they are in the service of the Federal government (and it may be an extended service) and while they are *receiving pay from that government*, and yet while they are in the short service of cities and counties, subdivisions of the State itself, refuse to pay them from the treasury and place that burden entirely upon the localities.

We note also that pensions are given under our Military Law only when the men are wounded or disabled "in the service of the State" (section 220) and that section 210 directs that all commissioned officers shall be entitled to and shall receive *the same* pay and allowances as commissioned officers of the army or navy of the United States of equal grade and term of service. If the military officers are to receive *the same pay* as like officers in the United States army or navy they could not if we attempt to apply section 210 to Federal service receive both State and Federal pay; for they would then not be receiving *the same pay* as the United States army or navy officers. It results that section 210 does not intend to cover service for the Federal government but only service for the State under orders of the Governor.

The militiamen at the border are not in my opinion entitled to State pay.

In view of the small compensation paid the private soldiers and musicians by the Federal government and the further fact that many of them are married men having families for whom they provide, it would give me very great pleasure if I could find some

statute or rule of law which would justify the payment of the \$1.25 per day while they are absent upon the border, but the Attorney-General does not make the law, and it is his duty to construe and administer it as it has been enacted by the Legislature without being influenced by sympathy or personal desire.

Dated, September 14, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. CHARLES S. WHITMAN, *Governor, Albany, N. Y.*

TRANSFER OF ENROLLMENT — RIGHT OF ELECTOR TO VOTE AT A PRIMARY HELD IN AN ELECTION DISTRICT OTHER THAN THE ONE IN WHICH HE ENROLLED — ELECTION LAW, § 19-a.

An enrolled voter cannot transfer his enrollment from one election district to another outside of the Assembly district in which he originally enrolled.

INQUIRY

Has an enrolled voter who removed from the district in which he enrolled the right to vote in a primary election in another district in the same county?

OPINION

A voter enrolls on general election day and if he subsequently moves from the district in which he enrolls, he loses his right to participate in any primaries held during that year, with but one exception which is set forth in section 19-a of the Election Law and is known as — special enrollment after moving — and gives him the right to transfer his enrollment from one election district to another in the same assembly district. Deerfield, Oneida county, being not in the same assembly district as Russia, Herkimer county, the party to whom you refer was thereby debarred from transferring his enrollment, and there is no method under the present law whereby he could be permitted to vote.

Dated, September 26, 1916.

E. E. WOODBURY,
Attorney-General.

To MARTIN H. ROTH, Esq., *Deerfield, N. Y.*

MARKING BALLOT — PROPER METHOD OF VOTING WHERE THE NAME OF THE CANDIDATE IS WRITTEN ON THE BALLOT BY THE ELECTOR — ELECTION LAW, § 358, SUBDIVISION 2.

When an elector writes the name of a candidate in the blank column on the ballot, the "X" mark should not be placed at the left of such name.

INQUIRY

When an elector writes the name of a candidate, whose name does not appear on the ballot, in the blank column of the ballot, is he required to place an "X" mark at the left of the name so written in?

OPINION

Subdivision 2 of section 358 of the Election Law states:

"To vote for any candidate not on the ballot, he shall write the candidate's name on a line left blank in the appropriate place."

You will therefore note by such provision that the "X" mark is not required.

Dated, September 28, 1916.

E. E. WOODBURY,
Attorney-General.

To THOMAS F. HARTIGAN, *Inspector of Elections, Ghent, N. Y.*

VOTING MACHINES — DETERMINATION OF LEGALITY OF USE OF TWO VOTING MACHINES UPON WHICH TO PLACE THE BALLOTS TO BE VOTED AT A GENERAL ELECTION — ELECTION LAW, §§ 331, 392 AND 397.

All ballots for candidates, propositions and questions submitted at a general election must be placed on one voting machine; otherwise, such machines should be discarded and paper ballots used.

INQUIRY

Can candidates for city offices at a general election be voted for on one ballot machine and the remainder of the ticket to be voted at such election be voted for on a separate machine?

OPINION

Section 392 of the Election Law prescribes the requirements of the voting machine, and among other things, directs that

"It must be so constructed as to provide facilities for voting for such candidates as may be nominated * * * and it must afford him an opportunity to vote for as many persons as he is by law entitled to vote for."

Section 397 prescribed the form of the ballot to be used on the machine, and the substance of such section is that the whole ticket shall be placed not on ballot frames, but it must be of a "size as will fit the ballot *frame*." The intent of the statute is that only one machine can be used by a voter at any election.

Assuming that it were lawful to use two or more machines upon which to place the various ballots to be cast at an election, the method which you suggest in your letter could not be carried out for the reason that the candidate for the city ticket must be placed on the same ballot with the candidates for the State, county and other offices.

Section 331 provides that there can be only five kinds of ballots; viz., ballots for presidential electors, ballots for general officers, ballots for constitutional amendments and questions submitted, ballots upon town propositions and ballots upon town appropriations.

Therefore it would be purely illegal under section 331 to attempt to place the city ticket upon a separate ballot or machine.

Dated, October 4, 1916.

E. E. WOODBURY,
Attorney-General:

To Hon. H. C. MIDLAM, *Mayor, Rome, N. Y.*

PRESIDENTIAL ELECTORS — ARRANGEMENT OF NAMES OF ELECTORAL CANDIDATES ON BALLOT — ELECTION LAW, § 331, SUBDIVISION 3.

The names of candidates for presidential electors nominated or endorsed by two or more political parties shall appear upon the ballot as many times and under the emblems of each party as nominated or endorsed by such party.

INQUIRY

In case two or more parties should nominate in whole or in part the same men for presidential electors, does the law providing that the name of a candidate shall appear but once upon the ballot ap-

ply to the ballot for presidential electors as well as the ballot for general officers?

OPINION

Section 331 of the Election Law classifies and prescribes the form of ballots for candidates. Subdivision 2 thereof pertains to the ballot for presidential electors and, among other things, provides the method for voting a straight ticket by making the "X" mark within the circle above the party column. It also states that the names of presidential electors of each party shall be printed in a column indicating first, the electors at large, and second, the electors of each district, arranged in the numerical order of the district.

It is therefore apparent that if a person is nominated as a presidential elector on several tickets, his name should appear upon each ticket.

Subdivision 3 of said section prescribes the form of ballot for general officers which provides for the grouping of candidates that no candidate's name shall appear more than once upon the ballot, and for the arranging of party emblems at the left of names of candidates who have been nominated or endorsed by more than one political party. The ballot for general officers is the only ballot upon which such requirements are demanded.

Dated, October 13, 1916.

E. E. WOODBURY,
Attorney-General.

To Mr. JOHN E. CORWIN, President, Board of Elections, Goshen,
N. Y.

PUBLIC HEALTH LAW, § 178 — VACCINATION — OSTEOPATHS.

An osteopath is not permitted to vaccinate his patients.

INQUIRY

Is an osteopathic physician authorized to vaccinate patients?

OPINION

It is my opinion that an osteopath may not vaccinate. Section 173 of the Public Health Law provides that "a license to practice

osteopathy shall not permit the holder thereof to administer drugs or perform surgery with the use of instruments." Now it is perfectly apparent that if a person neither an osteopath nor a medical man should set himself up as a "vaccinator" he would be liable for practicing medicine without authority. The point of the matter is just this, that vaccination is part of the practice of medicine and is not part of the practice of osteopathy as it is recognized. Sanitation and care of the patient from the after effects of vaccination are necessary and do not come within the scope of osteopathic functions, whether we regard the scratching of the arm as an operation in surgery or as the administration of a drug. It is my opinion therefore that an osteopath may not vaccinate a patient as a general rule.

I have sent a copy of this letter to Secretary Bancroft.

Dated, October 16, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. AUGUSTUS S. DOWNING, State Department of Education,
Albany, N. Y.

COUNTY CLERKS — CHARGE FOR PREPARING LISTS OF DENTISTS REGISTERED IN THEIR COUNTIES — PUBLIC OFFICERS LAW, § 67 — DEPARTMENT OF EDUCATION.

County clerks are entitled to make a charge for preparing for the State Department of Education lists of dentists registered in their counties, for there is no duty imposed by law to prepare such lists.

INQUIRY

Are county clerks permitted to charge a fee for preparing a list of dentists registered in their counties upon the application of the State Department of Education?

OPINION

The provisions of the Public Health Law, as amended by chapter 129, Laws of 1916, seem to assume that the board of dental examiners is in possession of a list of the registered and licensed dentists, though examination of the law as it stood before amendment shows that this is not necessarily true. Since it is the duty

of the secretary to mail to every registered dentist a blank, it is obviously necessary for him to have a list, and the expense of preparing such a list would seem to be a proper charge on the fund composed of the fees under section 200.

Section 67 of the Public Officers Law provides:

“ 1. Each public officer upon whom a duty is expressly imposed by law, must execute the same without fee or reward, except where a fee or other compensation therefor is expressly allowed by law.”

The duty of preparing a list of the dentists registered in their counties is not imposed upon the county clerks by law.

There is nothing in the law which requires the county clerks to supply lists, but only copies of new registrations, so they cannot be required under section 67 of the Public Officers Law to act without compensation.

The general rule is that where a county clerk exacts a fee he must put his finger on the statute authorizing it, but that rule applies only to fees for duties which are prescribed by law. If an individual wished to compile a directory of dentists, and applied to the county clerk for a list, he would have to make a deal with the county clerk for the preparation of it, or else would have to make a list himself from the record. The same is true of your department, for section 84 of the Executive Law, requiring certain searches, etc., to be made gratuitously by county clerks, applies only when the applicant is the Secretary of State, the Comptroller, the Treasurer, the Attorney-General or the State Engineer.

It is obvious that it would be cheaper to pay reasonable fees to the county clerks for compiling lists in the various counties, than to send an employee to each county to make a copy.

Dated, October 18, 1916.

E. E. WOODBURY,
Attorney-General.

To FRANK B. GILBERT, Esq., *Counsel, Department of Education,*
Albany, N. Y.

**VOTING MACHINES — METHOD OF GROUPING CANDIDATES — ELECTION LAW,
§ 397.**

Where space permits, the names of candidates for the same office need not be placed in spaces adjoining each other, and the names of the candidates of each political party should as nearly as possible be placed in one column, retaining either the vertical or horizontal arrangement of the candidates thereon.

INQUIRY

In grouping names of candidates on a voting machine, must such names be placed in spaces adjoining each other?

OPINION

Relative to the arrangement of the names of candidates for Supreme Court justices in the 8th Judicial District, on the voting machine, would state that this office is informed that your office has sent to the boards of elections of various counties wherein voting machines are used, a diagram of a sample ballot to be used at the coming election which said diagram of sample ballot groups the names of the candidates for the various offices to be voted for, such grouping to be either vertical or horizontal on such machines, and by such arrangement the names of candidates of different political parties are to be placed in the same column. That is, the names of such candidates are placed in the voting spaces one after another, leaving no blank voting space or spaces between any two candidates.

This office has inspected a copy of the sample ballot so sent out by your office, and finds that such sample ballot complies in every respect with the provisions of law relative thereto as set forth in section 397 of the Election Law, wherein it is stated that:

“The order of the lists or names of candidates of the several parties or organizations shall be arranged as provided by this chapter for blank ballots, except that they may be arranged either vertically or horizontally.”

However, such arrangement as shown on said sample ballot, a copy of which is hereto attached, is more or less confusing to the voter and causes him more or less difficulty in picking out the name of the candidate for whom he desires to vote, and therefore in order to simplify and to make as clear and plain as possible the

face of the ballot on said machine, it would seem to be the reasonable and proper arrangement to place the names of the candidates of each political party as nearly as possible in one column, still, however, retaining either the vertical or horizontal arrangement of the candidates thereon. In order to do so instead of placing the names of candidates for the same office in spaces adjoining each other where the necessity required, blank spaces could be left on the face of the machine. As an illustration, in using the horizontal arrangement where a Republican has been endorsed by the Democratic and American parties, and a candidate is running against such Republican candidate on the Prohibition ticket, instead of placing the name of the Prohibition candidate in the space adjoining that of the Republican candidate which would bring him in the Democratic column, the spaces in the Democratic and American columns could be left blank and the Prohibition candidate placed in the fourth column or the column containing the Prohibition ticket for presidential electors, thereby leaving two blank spaces between the Republican candidate and the Prohibition candidate which would still, however, retain the horizontal arrangement of the candidates on the ballot.

This arrangement of leaving blank spaces between the names of the various candidates running for the same office, should, of course, be done only on such machines having the capacity to accommodate such a ballot and only wherein such arrangement is practicable, and if such arrangement of the candidates cannot be made in a practicable manner, then the arrangement as set forth in the form of sample ballot issued by your office should be resorted to. Either arrangement would be in conformity with section 397 of the Election Law.

The arrangement that the candidates of each political party will be as near in the same column as possible, is in accordance with an opinion rendered by Justice Laughlin at a Special Term of the Supreme Court of Erie county, in the Matter of the Application of Frederick H. Holtz for a Writ of Mandamus vs. William J. Beyer and Frank J. Schmidt, as Commissioners of Elections for Erie county, and such arrangement of the names of the candidates on a machine where space will permit, seems to be a most practical and common sense arrangement and avoids the difficulties

which would be thrown in the way of the voter through the other method of grouping of candidates as is shown on the form of sample ballot issued by your office.

Dated, October 20, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. FRANCIS M. HUGO, *Secretary of State, Albany, N. Y.*

ELECTION LAW — VOTING MACHINES — BALLOTS.

A separate column is not required for each party upon a voting machine; although where the capacity of a machine is such that eight columns may be used, this might be permitted. Suggested arrangement of columns for the election of 1916.

INQUIRY

Must each political party be allowed a separate column on voting machine?

OPINION

There has been submitted to me by your department a proposed voting machine ballot. This shows a proposed method on an eight-column machine.

There has also been submitted to me a proposed voting machine ballot prepared by the voting machine companies, which has been sent broadcast throughout the State. This is for a seven-column machine.

You ask me if these ballots conform to the provisions of the Election Law. In my opinion, both of them do.

However, there is certain criticism to be made of the ballot proposed by the voting machine companies. It appears that although it is designed for a seven-column machine, nevertheless, it does not utilize the full capacity of the machine, only a few offices appearing in the seventh column. This ballot was criticized by Mr. Justice Crouch recently in a proceeding at Syracuse. The order of the learned judge in forbidding the use of voting machines in Syracuse, was, in fact, based upon the character of this ballot prepared by the voting machine companies. My deputy, who was in court, did not enter a formal appearance, and the order was entered

by consent. In any event, I hesitate to concur in the ruling made by Mr. Justice Crouch as to the illegality of the ballot he construed. As I have above stated, I believe it conforms with the law. However, it is crowded in its arrangement and rather confusing, and there is no reason why the various election commissioners of the different counties should not, so far as possible, facilitate the purpose of the voters in casting their ballots, by providing a more convenient arrangement.

The ballot for the eight-column machines which you submit to me is arranged practically the same as that considered and tacitly approved by Mr. Justice Sawyer in a proceeding in Rochester. There being eight parties, the eight-column ballot as you have arranged it, gives to each party a separate column in the order of their relative strength as determined at the last election for Governor. It is quite apparent that this provides for the vertical and horizontal arrangement prescribed in the Election Law. The difficulty, however, seems to have arisen where the seven-column machines are used, with the consequent impossibility of giving each party a separate column. As I advised you previously in a communication relative to the arrangement of the names of candidates for the Supreme Court of Buffalo, a separate column for each party is not required by the Election Law, although when the capacity of the machine permits, a separate column may be lawfully provided.

It is possible, for this reason, to modify the proposed method on eight-column machines, suggested by you to the capacity of the seven-column machine. It seems to me it would be perfectly lawful, where the machines have only seven columns, to move the American presidential electors from column 4 to 3, no presidential electors having been nominated by the Independence League. Since the American party has endorsed the Republican candidate for governor, it leaves only their candidates for other offices to be disposed of. So far as the State ticket is concerned, it appears that there is no contest between the Independence League and the American candidates for other offices. The other candidates of those two parties may therefore be placed together in column 3 with the least possible confusion. The entire Prohibition ticket can then be moved from column 5, as it appears on the eight-

column ballot submitted, to column 4. The Progressive could be moved from 6 to 5 and the Socialist from 7 to 6, and the Social Labor from 8 to 7. Since the Socialist party has nominated for nearly all offices, it would perhaps be a better arrangement to leave the Socialist presidential electors in column 7 instead of moving them into the blank space of column 6, over the Progressive candidates for other offices.

In my opinion the arrangement suggested would not only be convenient but would also be lawful.

The arrangement suggested for the seven-column machine will also provide space, especially in column 6, for filling in the names of local candidates where there are many nominations and crowding in other columns might result.

It is not my intention to suggest, however, that this arrangement for a seven-column machine, or for an eight-column machine is mandatory, or that they are in the opinion of this department, required. However, you have submitted to me a proposed sample ballot, and, of course, I confine myself simply to the statement of opinion that the proposed sample ballot for an eight-column machine and the suggestions for the arrangement of a ballot for a seven-column machine may be lawfully carried out.

Dated, October 27, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. FRANCIS M. HUGO, *Secretary of State, Albany, N. Y.*

VOTING RESIDENCE OF STUDENTS ATTENDING RELIGIOUS INSTITUTIONS OF LEARNING — ELECTION LAW, § 163.

A student for the priesthood, attending a Roman Catholic institution of learning, who has renounced all other residences or homes save that of the institution, cannot thereby obtain a voting residence in the election district in which such institution is located.

INQUIRY

Can a student of an institution of learning, who has no other residence than at such institution, obtain a voting residence in the district in which such institution is located?

OPINION

Section 183 of the Election Law states that:

"For the purpose of registering and voting no person shall be deemed to have gained or lost a residence * * * while a student of any seminary of learning."

This question has been passed upon and adjudicated by the Court of Appeals in the Matter of the Application of Francis A. Barry et al., etc., reported in 164 N. Y. 18, to which case I respectfully refer you, wherein it appeared as an undisputed fact that these students entered in good faith to become Roman Catholic priests and renounced all other residences or homes save that of the seminary itself, and that they continued to reside there after they were admitted to the priesthood and until assigned elsewhere by their ecclesiastical superiors, and upon such state of facts the Court of Appeals by unanimous opinion held that such persons could not acquire a residence from such institution for the purpose of voting.

Dated, October 31, 1916.

E. E. WOODBURY,
Attorney-General.

To Rev. FRANCIS G. FISCHER, *Rector, Mt. St. Alphonsus, Esopus, N. Y.*

PUBLIC BUILDINGS LAW — STATE CONTRACTS — SIGNATURES.

Contracts for State buildings should be executed as are contracts executed by corporations. They should be issued in the official name of the State board, department or commission making them, and the seal of the commission should be affixed where a seal is provided by law.

INQUIRY

Can a State board, department or commission delegate to a member or employee power to execute a contract which has been awarded at a regular meeting of the board or commission?

OPINION

A general answer may be made to your inquiry at this time, although I desire to point out that special circumstances may

arise under peculiar statutory provisions which should be dealt with separately.

Speaking of the situation generally I might say, therefore, that the powers of the different boards, etc., should be exercised in this matter like those of a corporation. As has been previously pointed out in opinions of this department, a State board, commission or department may not delegate discretionary powers to subordinates. I therefore advise that contracts should be accepted or entered into by resolution of the board or commission or by direction of the head of the department. Then, in the case of boards or commissions, a general resolution might be adopted and ratified from time to time as the personnel of the board or commission may change, authorizing the secretary or some other suitable officer or subordinate to sign the contract with the title of the board or commission over the officer's or subordinate's signature. In the case of departments having one head it seems to me that it would be not only convenient, but proper, for the head of the department himself to sign the contracts. Since most of the departments of government have a separate official seal, it suggests itself that its seal might also be affixed. However, it seems that this is unnecessary, unless required by statute, since there is no special reason for making contracts sealed instruments, unless the department should desire to hold the contractor to the twenty-year period in the statute of limitations. If this is found to be desirable, the department seal might be affixed and the contractor required to affix his seal, personal or corporate.

Dated, November 1, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. LEWIS F. PILCHER, *State Architect, Albany, N. Y.*

PRISON LAW, § 297 — TRANSFER OF CONVICTS FROM STATE PRISONS TO REFORMATORIES.

Where a board of managers of a State reformatory makes requisition upon the State Superintendent of Prisons under § 297 for a number of "well behaved and most promising convicts" under thirty years and first offenders to be transferred to such reformatory, the prison officials are not required to transfer the number requested unless in their judg-

ment there is a sufficient number of prisoners coming within the definition of "well behaved and most promising convicts," the interpretation of which must necessarily be left to such prison officials.

INQUIRY

Is the State Superintendent of Prisons required to transfer prisoners who are inmates of the State Prisons to reformatories upon the application of the Board of Managers of the State reformatories?

OPINION

It appears that the Board of Managers of the State reformatories has called upon you to transfer some two hundred prisoners to their institutions, under section 297 of the Prison Law. You state that although the statute has been on the books for many years, this is the first time, so far as you know, that a request for such transfer has been made.

You also call my attention to the fact that there has been provided at Comstock a prison such as probably was never contemplated at the time section 297 of the Prison Law was enacted, and that to transfer two hundred prisoners from that institution to reformatories would practically deplete Comstock.

The statute is peculiarly phrased, providing in substance that where the Board of Managers makes requisition on you for a number of "well behaved and most promising convicts" who are under thirty years of age and first offenders, you must transfer the number asked for. Now, as to the convicts who are under thirty years of age and first offenders, this information is easily obtainable. However, to determine what ones are "well behaved and most promising" is, indeed, a relative matter. Especially is this true of the term "most promising." I take it to mean that the prisoner shows great promise of reform under certain methods of discipline. He might be most promising for reformatory control, or most promising for discipline at Comstock.

These questions of behavior of convicts and of their promise of success under varying forms of discipline must necessarily be determined by the prison officials themselves, for they alone are in a position to know these facts.

The law does not require impossibilities, and if you have not a sufficient number of prisoners coming within the definition of section 297 of the Prison Law to meet the requisition of two hundred, you should inform the Board of Managers to that effect.

Dated, December 7, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. JAMES M. CARTER, *State Superintendent of Prisons, Albany, N. Y.*

APPROPRIATION BILLS — SALARY INCREASES OF STATE EMPLOYEES IN SEPARATE ITEMS — CONSTITUTION, ARTICLE III, § 21, AND ARTICLE IV, § 9.

A proposal to set forth in a separate line in the appropriation bill all proposed increases of compensation to employees of the State in order that such items of increase may be considered by the Governor as separate items of appropriation to which the Governor may object while approving other provisions of the bill, considered and held to be constitutional within the meaning of article III, section 21, and article IV, section 9, of the Constitution, where the bill distinctly specifies the sum appropriated and the object to which it is to be applied.

INQUIRY

By direction of the Governor, his Secretary requests an opinion on the following proposition:

“ It is proposed that all increases in salary to be set forth in the next appropriation act be set forth as follows:

Clerk	\$1,200
Increased compensation for above.	300

“ It is also proposed to put into the general language at the end of the appropriation act governing all of the act, a sentence reading substantially as follows:

“ All items in this act reading ‘ increased compensation for above ’ shall be construed to relate to the positions mentioned or described in item next preceding such item.

“ The question is whether such language is constitutional in the appropriation act and whether each line of such proposed items may be properly considered as an ‘ item of appropriation of money to which the Governor may object while approving other portions of the bill.’ ”

An opinion is requested with reference to setting forth in a separate item in the appropriation bill all proposed increases of compensation to employees of the State, in order that such items of increase may be properly considered by the Governor as separate items of appropriation, to which the Governor may object while approving other provisions of the bill.

The only provisions of the Constitution which seem to be applicable to this question are found in Article III, section 21 and Article IV, section 9 of the Constitution.

In section 21 of Article III, it is provided that: "Every such law making a new appropriation or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient for such law to refer to any other law to fix such sum."

Section 9 of Article IV provides that: "If any bill presented to the Governor contain several items of appropriation of money, he may object to one or more of such items while approving of the other portion of the bill."

Your proposal does not seem to violate any of the provisions of section 21 of Article II since

- (a) The sum appropriated is distinctly specified;
- (b) The object to which it is to be applied is distinctly specified, and
- (c) No reference is made to any other law to fix the sum.

You will note that section 21 of Article III requires that the "law" making the appropriation must contain those essential features. It is not essential that each item shall, in itself, comprehend these three features.

If the appropriation act as a whole contains provisions which, read together, make definite and certain the intent of the Legislature and the object of the appropriation expressed in each item, the constitutional provision is satisfied.

If the appropriation act should separately set forth each increase in salary in the manner proposed by you, it seems to me that the item of increase would be a separate item within the meaning of Article IV, section 9, and if there should be inserted

at the end of the appropriation act a general provision such as is proposed by you explaining the object of the separate item, each of such items of increased compensation would specify not only a certain sum of money appropriated but also specify clearly the object to which it is to be applied within the meaning of Article III, section 1, of the Constitution.

Dated, December 12, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. WILLIAM A. ORR, *Secretary to the Governor, Albany, N. Y.*

BOXING MATCHES — JURISDICTION OF STATE ATHLETIC COMMISSION UNDER (L. 1911, CHAP. 779).

Where sparring matches are held at the lodge rooms of a fraternal organization between members of the order simply for the entertainment of the members in order to stimulate attendance at meetings without a charge for admission directly or indirectly, such boxing or sparring matches, if conducted in good faith under such conditions, do not come under the jurisdiction of State Athletic Commission and do not require a license under the Athletic Commission Law (L. 1911, Chap. 779).

INQUIRY

Does a fraternal organization require a license under the Athletic Commission Law in order to permit members of the fraternity to engage in sparring bouts at the lodge rooms for the entertainment of the members where no admission is directly or indirectly charged.

OPINION

You request an opinion with reference to the applicability of chapter 779 of the Laws of 1911, which established the State Athletic Commission, to a situation which you state has existed in your city for several years. The K. O. T. M. Lodge of your city has been having boxing at the lodge rooms on regular lodge nights, the contestants being only members of the order simply for the entertainment of the members for the purpose of stimulating attendance and not for any profit whatsoever, there being no admission charged or collection taken.

This seems to be a matter coming within the purview and jurisdiction of the officers and tribunals having charge of the prosecution of the criminal law of the State. My view of the statute leads me to believe that it is a matter which should be taken up with the District Attorney but I am very glad to give you my personal opinion as to the applicability of the boxing law to the matter in question for what it may be worth to you in presenting the matter to the District Attorney for his opinion.

It seems to me that reading the boxing law as a whole and considering also section 1710 of the Penal Law which previously regulated prize-fighting and sparring in this State, the kind of exhibitions given by the lodge in question simply for the entertainment of its members and without a charge of admission directly or indirectly is not within the spirit or terms of the boxing law. I have no doubt that such sparring matches are being held in the gymnasium of almost every Y. M. C. A. in the State and in the various colleges of the State; that such matches are in no sense a commercial enterprise, not being held for the purposes of pecuniary gain directly or indirectly. The public is not invited to attend and pay admission or contribute by indirection. If an admission fee were charged either directly or indirectly, it would come within the purview of section 1710 of the Penal Law or within chapter 779 of the Laws of 1911.

The Athletic Commission Law of 1911, which sought to take the place of the Penal Law provision, seems to give the Athletic Commission jurisdiction over all boxing and sparring matches under the broad general language of section 3 but reading the act as a whole, you find that it contemplates the payment of a tax for the privilege of being licensed under this act which tax is based upon the gross receipts from the sale of tickets or otherwise and requires the filing of a bond with the State Comptroller as a condition precedent to the granting of a license, which bond undertakes to guarantee to the State the payment of a tax based upon the gross receipts.

All of these provisions seem to indicate very clearly that the broad general language of section 3 was intended to refer to clubs, corporations or associations licensed pursuant to this act and the clubs, corporations or associations required to be licensed were

those holding exhibitions for which an admission fee was charged. The law was aimed at the commercial enterprise open to the public upon the payment of some admission charge. Without such an interpretation, the balance of the act relating to the payment of a tax upon gross receipts and the filing of an undertaking therefor has no application without compelling a Y. M. C. A. or a college, club or a lodge to commercialize the sport by charging an admission in order that a license might be issued and the State receive a tax. This is such a strained construction of the entire act, that I cannot believe that that was the intention of the Legislature. The intelligent construction seems to permit the distinction which I have sought to make. This distinction is, of course, dependent upon the facts in each case it being necessary to prove in each case that the affair is bona fide within the terms of the distinction and not a mere evasion of the spirit and letter of the law. It does not seem to me that the distinction which I seek to make would open the door to abuse by permitting athletic associations to pretend to give private exhibitions open only to those holding certificates of membership in the club but which certificates are merely in the nature of tickets for the exhibition; because the law will look through the form and find the substance and it would very probably be held as a matter of fact in such a case, that admission was charged indirectly.

It does not seem to me that in the case of the lodge in question where the sparring matches are held without charge directly or indirectly and are simply given for the purpose of stimulating attendance at the lodge as an incident to a lawful purpose carried on in good faith for the accomplishment of that purpose and not as a means of evading the boxing law, they can come under the condemnation of the Penal Law provision or within the purview of the boxing law.

Again permit me to assure you that my opinion in this matter has no binding effect upon the officers and tribunals having jurisdiction over the prosecution of the criminal law of the State but is rendered to you simply for the purpose of indicating my personal judgment of the principle involved. The applicability of

this principle should be determined by yourself and the District Attorney in accordance with the facts in each case which you are better able to obtain than I.

Dated, December 14, 1916.

E. E. WOODBURY,
Attorney-General.

To Mr. THOMAS E. REEDER, *Acting Chief of Police, Jamestown.*

N. Y.

ENROLLMENT OF VOTERS — DETERMINATION OF LEGALITY OF USE OF PENCIL OTHER THAN SUCH AS CONTAIN BLACK LEAD — ELECTION LAW, § 10.

The use of a pencil containing black lead is to prevent identification of ballots, and the enrollment of voters is not surrounded with such secrecy as prohibits the use of ink or pencil containing any other color than black.

INQUIRY

Does any other method of marking an enrollement ballot than the use of a pencil containing black lead invalidate the enrollment?

OPINION

Section 10 of the Election Law provides that in marking the enrollment blank, the voter after he enters the booth and closes the door, "may make a cross X mark with a pencil having black lead in the circle underneath the emblem of the party of his selection," etc.; and also the last paragraph of section 10 provides that: "One mark crossing any other mark at any angle within the circle shall be deemed a cross mark within the meaning of this article."

Enrollment is not surrounded with absolute secrecy such as is provided for voting. The only secrecy involved in an enrollment is the marking of the enrollment blank, folding the same and depositing it in the enrollment box. Thereafter the box is opened, the enrollment tabulated and printed and it becomes a public record from which any person may ascertain the party affiliation of the person so enrolled.

The purpose of making the voting of a ballot only by means of a pencil having black lead is to guard against permitting the voter to mark his ballot for identification. No such reason exists for

the marking of an enrollment blank, and, therefore, to hold that an enrollment blank marked with other than a pencil having black lead is improperly marked, would be in a sense ridiculous, and I am of the opinion that the courts would hold that an enrollment blank, having the "X" mark in the circle, in ink, should be counted and the person properly enrolled by the authorities charged with that duty.

Dated, December 15, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. FREDERICK P. OCKERMAN, County Clerk, Broome County,
Binghamton, N. Y.

PUBLIC LANDS LAW, § 51—ABANDONED CANAL LANDS—DISPOSITION OF WHERE ACQUIRED WITHOUT CONSIDERATION—EFFECT OF (L. 1916, CHAP. 299).

Canal "lands and structures rendered useless for canal purposes by the improvement of the State canals" authorized by the various Barge canal laws should be sold in the manner provided by sections 52 to 59-a of the Public Lands Law as added by L. 1916, chap. 299 and section 51 of the Public Lands Law relating to the release of land acquired without consideration to the person from whom the same was acquired or his heirs or assigns, applies only to canal lands which, for reasons other than the improvement of the State canals pursuant to the various Barge canal laws, have become unnecessary and have been abandoned.

INQUIRY

What procedure should be followed in connection with the sale of abandoned canal lands which were conveyed to the State without consideration?

OPINION

Section 51 of the Public Lands Law reads as follows:

"§ 51. Release of land acquired without consideration. If the State acquired title to any such real property, by grant or otherwise, from the owner, without the payment of any consideration therefor, the commissioners may release to the person from whom the same was acquired, or his heirs or assigns, all the right, title and interest of the State in and to such real property, to be held subject to such rules, regulations and requirements as the commissioners deem for the best interest of the State."

Your inquiry raises the question as to the effect upon this section of the enactment of the so-called Walters Law (chapter 299, Laws of 1916).

Prior to the enactment of the Walters Law provision for the sale of abandoned canal lands was contained in Article IV of the Public Lands Law, sections 50 and 51.

Section 50 provided for the sale by the Commissioners of the Land Office of all abandoned canal lands. Then followed section 51 above quoted.

The Walters Law amended section 50 by providing that "lands and structures rendered useless for canal purposes by the improvement of the State canals authorized by" the various Barge Canal Laws should be abandoned and sold as and in the manner provided by sections 52 to 59-a of the Public Lands Law as added by the said Walters Law.

Sections 52 to 59-a in terms defined the procedure to be pursued in the abandonment and sale of all such canal lands.

While the intent of the Walters Law with respect to the disposal of canal lands acquired without consideration is not made as clear as it might be, from a reading of Article IV as a whole, in the light of the history of the enactment of its several provisions, I am persuaded that it was the legislative intent that all canal "lands and structures rendered useless for canal purposes by the improvement of the State canals authorized by" the various Barge Canal Laws, and therefore abandoned, should be sold as and in the manner therein provided, and that section 51 relates and applies only to canal lands which for reasons other than the improvement of the State canals pursuant to the various Barge Canal Laws have become unnecessary and have therefore been abandoned by the Canal Board.

This will leave section 51 with a very limited scope or application; but if we are to give force and effect to the provisions of the Walters Law I can see no escape from this conclusion.

Dated, December 15, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. FRANK M. WILLIAMS, *State Engineer and Surveyor, Albany, N. Y.*

LOAN BY A TRUST COMPANY TO ONE PERSON OR CORPORATION — LIMITATION TO 40 PER CENT. OF CAPITAL AND SURPLUS — LOANS OF TRUST FUNDS NOT INCLUDED — BANKING LAW, §§ 190, 108, 188, 239 — DECEDED ESTATE LAW, § 101.

The limitation to 40 per cent of the capital and surplus of a trust company, on the liability of any one individual, association or corporation to such trust company, does not include loans to such person or corporation of funds held by the trust company as trustee.

INQUIRY

Does section 190 of the Banking Law, subdivision 1-c, restricting the liability to a trust company of any person, association or corporation to 40 per cent. of the capital and surplus of the trust company, apply to loans made by the trust company in a representative capacity as a testamentary trustee?

OPINION

We believe that the section does not include loans made in a representative capacity. Section 190 is drawn on lines similar to section 108 which limits the loan of bank funds; and various phrases in section 190 seem to bear out the conclusion that the section is dealing only with the loan or investment of the trust company's corporate funds and not with the investment of the funds held by it in a representative capacity.

For instance the section in several places refers to the "liability to the trust company" and not to the liability to the trust company as trustee. All the recitals in the section of what the word "loan" includes connote that the prohibition lies only against the operations of the trust company under its bank powers and not against its operations as trustee. To illustrate, subdivision 1 provides:

"A trust company subject to the provisions of this article:

1. Shall not directly or indirectly lend to any individual, partnership, unincorporated association, corporation or body politic, an amount which, *including therein any extension of credit to such individual, partnership, unincorporated association, corporation or body politic, by means of letters of credit or by acceptances of drafts for, or the discount or purchase of the notes, bills of exchange or other obligations of, such individual, partnership, unincorporated association, corpora-*

" *tion or body politic, will exceed one-tenth part of the capital stock and surplus of such trust company, * * *.*"

And subdivisions a, b and c provide (we quote in full for purposes of further comment) :

" (a) The restrictions in this subdivision shall not apply to loans to, or investments in, the interest bearing obligations of, the United States, this State or any city, county, town or village of this State.

" (b) If such trust company is located in a borough having a population of two millions or over, the total liability to such trust company, of any state other than the State of New York or of any foreign nation, or of a municipal or railroad corporation, or of a corporation subject to the jurisdiction of a public service commission of this State, may equal but not exceed twenty-five per centum of the capital and surplus of such trust company; and the total liabilities to such trust company or any individual, partnership, unincorporated association, or of any other corporation or body politic, may equal but not exceed twenty-five per centum of the capital and surplus of such trust company, provided such liabilities are upon drafts or bills of exchange drawn in good faith against actually existing values, or upon commercial or business paper actually owned by the person negotiating the same to such trust company, and are endorsed by such person without limitation, or provided such liabilities in excess of ten per centum of such capital and surplus, and not in excess of an additional fifteen per centum of such capital and surplus, are secured by collateral having an ascertained market value of at least fifteen per centum more than the amount of the liabilities so secured.

(c) If such trust company is located elsewhere in the State the total liability to such trust company of any state other than the State of New York, or of any foreign nation, or of a municipal or railroad corporation, or of corporation subject to the jurisdiction of a public service commission of this State, may equal but not exceed forty per centum of the capital and surplus of such trust company; and the total liabilities

to such trust company of any individual, partnership, unincorporated association, or of any other corporation or body politic, may equal but not exceed forty per centum of the capital and surplus of such trust company, *provided such liabilities are upon drafts or bills of exchange drawn in good faith against actually existing values or upon commercial or business paper actually owned by the person negotiating the same to such trust company, and are endorsed by such person without limitation, or provided such liabilities in excess of ten per centum of such capital and surplus, and not in excess of an additional thirty per centum of such capital and surplus, are secured by collateral having an ascertained market value of at least fifteen per centum more than the amount of the liabilities so secured.*"

Note furthermore that subdivisions a, b, and c in their opening clauses deal with investments by a trust company in state, municipal, railroad and public service corporation bonds or obligations. This must refer to the investment of corporate funds for the investment by a trust company as trustee is seemingly controlled by an entirely separate section of the Banking Law, section 188, subdivision 7, which authorizes unlimited investment in certain state and municipal securities known as savings bank investments (section 101 Decedent Estates Law; section 239 Banking Law).

Moreover if we were to regard loans as trustee as included within the prohibition of section 190 the trust company doubtless might oftentimes be unable to co-operate with an individual co-trustee who is free from such limitation or would in many instances have to act counter to specific directions for investment contained in a trust instrument.

Dated, December 28, 1916.

E. E. WOODBURY,
Attorney-General.

To Hon. EUGENE LAMB RICHARDS, *Superintendent of Banks, Albany, N. Y.*

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bond which was duly approved and entered upon the discharge of his duties and had, at the time of making an affidavit in this proceeding, collected about \$10,000.00 of \$12,000.00 of the taxes of such town under the tax roll issued in December, 1915.

The appellant was never called upon to execute any bond, and never received any notice of the amount of taxes to be collected as required by section 114 of the Town Law, which fixes and determines the penalty of a bond; but did take the oath of office and attempted to qualify by filing a bond in the penal sum of \$1,000.00.

The respondent is thirty-two years of age and has always lived and resided in the town of Lindley, Steuben county, except about three months in the year 1915, to wit: From the 17th day of April to the 16th day of July, 1915. He has always voted in such town since he obtained his majority and for some years has owned a farm therein, upon which he has always paid the taxes since he became the owner thereof.

On or about April 17th, 1915, the respondent rented his farm, together with quite an amount of stock, personal property and some household furniture, to one Guy Maloney for a period of one year and until April 1, 1916, upon shares; Mr. Miller, the respondent, to have two-thirds of the proceeds, and pay all taxes, and Mr. Maloney to have one-third of the proceeds, and on the said 17th day of April, 1915, the said Miller, accompanied by his wife and two boys, left the town of Lindley and went to Sarasota, Florida, where they kept house for a time, and the climate and conditions not agreeing with the respondent and his family, they returned to the town of Lindley, bought out the interest which the said Guy Maloney held under a lease of his farm and property, and resumed his old residence upon his farm.

REPORT AND CONCLUSIONS.

The only question which arises upon this application is one of fact, viz., whether Harry D. Miller lost his residence as an elector of the town of Lindley by his trip to Florida, and was thus rendered ineligible to be elected to any town office, until he had regained a residence.

It is provided by section 81 of the Town Law as follows:

" § 81. Eligibility of town officers.— Every elector of the town shall be eligible to any town office, except that inspectors of election shall also be able to read and write. But no county treasurer, superintendent of the poor, school commissioner, trustee of a school district, or United States loan commissioner, shall be eligible to the office of supervisor of any town or ward in this State."

The question of residence under the circumstances in this case must necessarily turn largely upon the intention of the respondent when he went to Florida. If he went there with the intention of giving up his residence in New York and residing thereafter in the State of Florida, he lost his residence as a voter and elector within the State and was ineligible to hold any town office in the State until he had regained a residence by at least a year's residence within the State, four months in the county and thirty days within the town; on the contrary, if he had no such intention, then he never lost his residence within the town and was at all times eligible to be elected to such office of collector.

It is claimed on the part of the petitioner that the respondent rented his farm for a year, moved the most of his household goods, and his family to Florida, and stated on several occasions before he went that he had been down there and had made arrangements to go there and make his home. That while he was away he advertised his farm for sale and had placed it in the hands of an agent to effect a sale, and that he, the respondent, fully intended to change his residence when he left the State of New York, and that he lost his residence in Lindley and had not resided long enough therein after his return to regain a residence before his election to the office of collector.

It is alleged on the part of the respondent, that his absence from the town of Lindley was only temporary and that his trip to Florida was only for the purpose of investigating conditions, with a view of taking up a residence there later if he was satisfied that it would improve his business prospects, but that he never went there with the intention of giving up his residence in Lindley until he was satisfied after a reasonable sojourn in the south that a change

would be desirable; that he only rented his farm for one year with the expectation of returning to his home unless he and his family were all pleased with prospects and climatic conditions in Florida; that he left all of his stock and personal property in Lindley awaiting his return except a small amount of household goods with which he could do temporary housekeeping while in Florida; that the said Miller stated on different occasions in both private and public conversations that he was "going to Florida as an experiment and to try it and was not going to give up his connections in the town of Lindley until he was satisfied that he wished to become a resident of Florida;" that in connection with his southern trip he was acting as agent for his brother who had an option upon a piece of real estate at Sarasota, Florida; that soon after their arrival in Florida, and within four days after reaching their destination, the respondent's wife became dissatisfied with the conditions and within two weeks after their arrival they fully decided to return to Lindley; and did so return within less than three months after their departure; that never at any time did the said Miller or his family decide to settle in Florida or to make their residence or home there, but on the contrary they concluded, almost from the start of their sojourn in Florida, to return to their home in New York State after a temporary trial of conditions, and that said Miller never intended to, and never did in fact, give up his residence in Lindley but has always remained since he reached his majority, a resident and an elector of such town, and was eligible to be elected to the office of collector. It is also claimed by the respondent that he has offered and advertised his farm in Lindley for sale, since 1914, but that his desire to sell was to enable him to purchase a farm in a more desirable location in said town and not because he intended to move to Florida.

Residence and citizenship are largely questions of intent, and the intent must generally be gathered from the acts, circumstances and conditions of the party. A temporary change of domicile for the purpose of investigating conditions would not work a change of residence unless it was accompanied with an intent on the part of the person to make a permanent change. Temporary changes of location and abode are very frequent in this country and such changes do not forfeit a person's residence in the place where he

has established a permanent residence unless he intended to make such change either at the time of the removal or while absent from his permanent residence.

"Citizenship in a state is lost whenever the person moves away with the intent to change his domicile, and no particular length of absence is necessary to lose his citizenship in the state from which he departs * * *. One residence cannot be considered as abandoned or changed until another is gained, unless the party abandoned his former residence with the intention of never returning, in which event he would certainly lose his citizenship in the state he had left."

Opinion of Attorney-General, 1909, page 878.

Bassett v. Wheeler, 84 N. Y. 466.

In the Matter of Nicholas, 54 N. Y. 62.

"To effect a change of domicile for the purpose of succession there must be not only a change of residence, but an intention to abandon the former domicile and acquire another as the sole domicile. There must be both residence in the alleged adopted domicile and intention to adopt such place of residence as the sole domicile. Residence alone has no effect *per se* though it may be most important as a ground from which to infer intention. Length of residence will not alone effect the change. Intention alone will not do it, but the two taken together do constitute a change of domicile."

Dupuy v. Wortz, 53 N. Y. 561, and cases cited.

"And in all cases where a statute prescribes 'residence' as a qualification for the enjoyment of a privilege or the exercise of franchise, the word is equivalent to the place of domicile of the person who claims its benefit. * * * And his absence from that county, however long, so that it is temporary, and not in abandonment of his home, will not deprive him of his residence, though his absence extend through a series of years."

People v. Platt, 117 N. Y. 167.

The evidence is quite conflicting in the case at bar and a decision made upon conflicting affidavits must be somewhat unsatisfactory; but the petitioner having alleged the non-residence of the respondent is bound to establish it by a fair preponderance of evidence, I am unable to find that he has fully and sufficiently met the requirements of the rule.

The fact that the respondent was nominated by his party and elected by a substantial majority indicates that the people must have considered him eligible to the office. While this last fact is not at all conclusive, I think it is proper to give it due consideration in passing upon the merits of this application, for it would be unjust to compel the respondent to defend his title to an office to which the people of his town have elected him by over sixty majority unless sufficient facts are shown to warrant the conclusion that the expression of the people should be overthrown on account of the plain ineligibility of the respondent, and that the action could be maintained upon the merits, otherwise the respondent should not be disturbed in the enjoyment of his office. I do not believe that the petitioner could succeed if an action were permitted to be brought, and I am unable to ascertain that there is any strong local demand for the commencement of such an action.

I am, therefore, of the opinion that the petitioner has failed to establish by a preponderance of evidence, a *prima facie* case for the commencement of an action to try the title to the office of collector in the town of Lindley, and I do therefore, recommend that the application be denied.

GEORGE A. FISHER,
Third Deputy Attorney-General,

Approved and ordered accordingly.

EGBURT E. WOODBURY,
Attorney-General.

In the Matter of the Application made by one WILLIAM E. KARNS, who claims to have been elected to the office of Supervisor of the town of Albion, Orleans county, New York, to have an action commenced in the name of the People, in the nature of quo warranto to try the title to such office, and to oust and exclude therefrom GEORGE A. PORTER who was awarded the certificate of election at a town meeting held in said town on the 7th day of March, 1916.

APPEARANCES.

Gerald B. Fluhrer, for the petitioner.

Charles G. Signor and Thomas A. Kirby, for the respondent.

TOWN LAW, § 49—TOWN MEETINGS—COUNT OF VOTE—INSPECTORS OF ELECTION.

Where persons without authority conducted the count of the ballots at a town meeting a person who by the result appears to have been elected should not be ousted from his office, unless it is shown that the irregularities actually resulted in a false or mistaken result.

FACTS.

On the 7th day of March, 1916, the biennial town meeting in the town of Albion, Orleans county, was held and at the time of such town meeting and for some time prior thereto, Friendly A. Stoughton, Charles H. Porter, Henry C. Tucker and Truman A. Clark were the duly elected and acting justices of the peace in and for said town. Frank A. Buell was the town clerk.

That on the said 7th day of March or immediately prior thereto three of said justices, to wit: Friendly A. Stoughton, Henry C. Tucker and Charles A. Porter appointed Walker M. Hannington and Robert Maxon to act as poll clerks, Arthur J. Nixon and Francis H. Blake to act as ballot clerks, and Albert H. Bidelman, H. G. Dickinson, Archibald Webster, Alexander Strouse, Henry Hughes and George McFarland, Jr., as extra clerks at said town meeting. Truman A. Clark, one of the Justices, was sick on the date of said town meeting and was unable to act thereat. The town clerk was also sick and absent from the town meeting and one Harry E. Colburn was duly nominated and elected at the town meeting to act as town clerk during said town meeting. That the said Colburn took the constitutional oath of office, but the record

is silent as to whether any of the poll, ballot or extra clerks were sworn or took any oath of office.

The three justices who were not incapacitated and the said Colburn, or a majority of them, were present during the taking of the ballots and the canvass thereof which followed.

The four questions under the Liquor Tax Law were also submitted to the voters at said town meeting.

At said town meeting there were three candidates for the office of supervisor of said town as follows:

George A. Porter (Respondent), Republican candidate,

William E. Karns (Petitioner), Democratic candidate,

Bert L. Perkins, Prohibition candidate.

Also candidates for such other town officers as were to be elected at such town meeting.

At the close of the polls, the said justices, acting town clerk, with the poll, ballot and extra clerks proceeded to canvass the ballots both for town officers and upon the liquor questions. Some of such persons canvassing the excise votes at one table within the inclosure and the remaining persons canvassing the ballots for town offices upon another table within such inclosure.

Upon the canvass of the ballots for town officers, after a comparison had been made of the ballots with the stubs, etc., the group which participated in the count of the town officers' ballots proceeded as follows:

The ballots were unfolded and placed in a pile and H. G. Dickinson, one of the extra clerks, stood up and called, from said ballots, the name of the candidate for supervisor for whom it was cast, or, if it was void or blank, that fact, and then proceeded to call from such ballot the names of the candidates for town clerk, collector, overseer of the poor, town superintendent of highways and justice of the peace, full term, in the same manner. He then passed the ballot to Justice Porter and he examined the same and turned it face down upon the table in front of him. The poll clerk, Hannington, kept the tally solely as to the candidates for supervisor, and others of the extra clerks kept the tally as to the other candidates above named, so that only one clerk kept tally for only one candidate. After the first section of the ballot had been counted the same method was adopted as to the remaining

candidates on the ticket. During the canvass four ballots were laid aside for further consideration and not counted until the count of all the other ballots was completed.

At the close of the canvass upon supervisor, before the four last aforesaid ballots had been counted, it was found that the count stood as follows:

George A. Porter.....	664
William E. Karns.....	664
Bert L. Perkins.....	69
Void.....	20
Blank.....	68

The four ballots which had been laid aside temporarily were then taken up and were passed upon by the board, and three of them were counted for Mr. Porter and one counted for Mr. Karns. This gave Mr. Porter a majority of two and he was declared elected and has since taken the oath of office and duly qualified for such position and is now acting as supervisor of said town.

It was found upon the first count of the ballots and stubs before the same were opened that there were 1,488 ballots cast, but by the canvass as finally made after the four questioned ballots had been counted, there appeared to be 1,489. This discrepancy is explained by Mr. Hannington, who kept the tally as to supervisor: He says that a ballot which had been originally called "blank" was changed to the column of "void" ballots, upon the discovery that it was void instead of blank, and he intended to omit the next call of a blank ballot from the tally, but through thoughtlessness or inadvertence he failed to do so and thus one blank ballot was counted in excess of the true number of such blank ballots. If this is the correct explanation, the discrepancy between the number of ballots counted and those first found in the box cannot affect the result as to supervisor, and even if one vote is taken from Mr. Porter, he would still have a majority of one.

After some 300 or 400 ballots had been counted on the first section of the ticket, and it was discovered that the result on supervisor was sure to be close, Harold A. Blake and Gerald B. Fluhrer came within the guard rail and participated to some extent in the examination of the ballots, and after objections had been made to their presence within the guard rail the said Blake,

as chairman of the Democratic Committee, made an appointment of himself and Mr. Fluhrer as Democratic watchers and remained present until the close of the canvass. In the early part of town meeting day, Herbert Hudson and Frank J. Britton had been duly appointed as Democratic watchers by two separate certificates and no revocation or withdrawal of such certificate was at any time made, but the said Blake assumed to appoint himself and Mr. Fluhrer as watchers, and to act as watchers from that time on during the canvass, and in doing so claimed the right to examine and inspect and did handle and inspect all ballots which they desired.

After the count had been completed on the office of supervisor, said Blake and Fluhrer filed with the town board a protest against the canvass as made, claiming that the canvass had not been made in accordance with the provisions of the Election and Town Laws, and specified several grounds of alleged irregularity and also demanded that the ballots cast at the said town meeting be re-canvassed and re-counted in the manner provided by section 368 of the Election Law, and other provisions of the said Election and Town Laws which it was claimed related thereto; and the said Blake and Fluhrer also made oral protests and objections during the canvass, and demanded that the ballots be counted personally by the justices of the peace, but no further count was made of such ballots.

The poll, ballot and extra clerks were divided between the two main political parties, each party having an equal number thereof.

During the canvass of said ballots there was much wrangling, noise and confusion which at times was almost riotous and tended seriously to interrupt the orderly conduct of the count and to cast doubt and discredit upon the accuracy thereof owing to the tumult which raged about the board.

That all of the ballots cast at said town meeting, including those that were counted as well as those that were found blank and void have been properly cared for and kept inviolate and are still in the hands of the town clerk.

That the canvass of all ballots, both excise and town, was a long tedious job and the board was in continuous session from the closing of the polls on March 7th about sunset, until about noon on

March 8th, which involved an all-night session and coincidentally therewith all the fatigue, lassitude and inertia which the board, clerks and participants must have had to endure during such long and strenuous labor.

After the count, some fifty ballots were protested and placed in a separate envelope and filed in the town clerk's office and endorsed as follows: "Protested after sixth section of ballots were canvassed, filed March 8/16., F. W. Buell, Town Clerk." Other envelopes were filed in the town clerk's office containing alleged blank and void ballots used at such town election but it is claimed that several of the ballots which were marked as "void" had been counted by the board on the candidates for supervisor during the count of the first 300 or 400 ballots on the first section of the ticket before the Democratic party had any watchers present and that several should not have been counted for either candidate of supervisor, which had actually been counted before that time.

It is also testified by one Chester M. Harding that before any Democratic watcher was present he detected the said Dickinson in reading off a ballot for Mr. Porter for supervisor which had been cast for Mr. Karns, and that he called Mr. Dickinson's attention to his error. Mr. Dickinson in reply says he has no recollection of said Harding ever calling his attention to any miscalled ballot; and Charles A. Porter, one of the justices sat immediately at the left of Mr. Dickinson throughout the canvass and testifies that he has no recollection of the said Harding calling Mr. Dickinson's attention to a miscalled ballot at any time; and Walker N. Hannington testifies that after the canvass of votes on supervisor had been completed, he had a talk with the said Chester M. Harding and said Harding stated to him that he would be willing to certify that the tally kept by him (Mr. Hannington), in reference to the Porter and Karns vote, was correct as called; that he had kept a personal tally and his tally agreed with the tally sheet kept by him, the said Harding.

John C. Knickerbocker, the district attorney of Orleans county, testifies that he carefully examined the four ballots laid aside as hereinbefore stated, and that they complied with the election law and that he advised the counting of all of such four ballots as they were counted.

REPORT.

By section 49 of the Town Law it is provided that town meetings when held at a time other than at the general election, and in one voting place, shall be presided over by the justices of the peace of the town, and the town clerk, by another section is required to attend, keep a poll list, and accurate minutes of the proceedings at the town meeting, etc., but I am unable to find any provision for the appointment of either ballot, poll or extra clerks at a town meeting; but this is not an application to have the town meeting set aside and a new one ordered, or to secure an adjudication as to the validity thereof; but is an application on the part of the Democratic candidate, Mr. Karns, to bring an action in the nature of *quo warranto* to try the title of the office of supervisor, as based upon the result of the town meeting held therein on the 7th day of March, 1916, and to oust and exclude Mr. Porter, the Republican candidate, therefrom upon the alleged grounds that he, Mr. Karns, was elected to such office at such town meeting and not Mr. Porter, to whom the certificate of election was awarded by the board.

If I were sitting as a trial judge upon the facts as disclosed by the various affidavits and exhibits before me, I would find in favor of the respondent. The count as made gave Mr. Porter a majority of two, and as majorities win in this country, no matter how small they may be, he is entitled to hold the office unless it can be shown that the count was erroneously stated, and this is an application on the part of Mr. Porter's competitor to be allowed to go into a court of justice and try the title to such office where both parties will be permitted to produce all the evidence either may have, and the ballots can be re-examined and re-counted, if deemed necessary by the Court, and a fair and impartial trial had, and in the light of all the facts and circumstances surrounding this town meeting, I think the ends of justice will be better subserved and more highly promoted by allowing such an action to be brought, than they would be if it were denied. The vote was very close; many outsiders, not only extra clerks, but others, were allowed to handle and examine the ballots; much noise and disturbance prevailed throughout the canvas which might have caused mistakes in

ascertaining the true result; some 300 or 400 ballots were counted before any person clothed with authority to watch the count on the part of Mr. Karns took any active interest in the work, and it is claimed and alleged that several ballots were erroneously counted during that time; and the justices of the peace, who were the only persons having statutory authority to count and canvas such ballots, refused to do so after repeated demands had been made upon them both orally and in writing demanding that they re-count the ballots. I think, sufficient grounds exist to call for a judicial investigation as to which of the candidates were elected.

The ballots have all been carefully preserved, and if a trial is had the correctness of the count can be verified, and if the ballots were not correctly counted, and if Mr. Karns did receive a majority of the legal votes cast, he ought to be given an opportunity to demonstrate that fact.

Mr. Porter's title to the office is challenged and disputed and I think he will welcome an opportunity to go before a fair and impartial court and establish it and thus vindicate his title thereto.

Whichever of these men received the highest number of legal votes should be allowed to reap the fruits of his victory, but neither party can afford to hold the office if it is tainted by suspicion.

I do therefore recommend that an action be allowed to be brought in the name of the People on the relation of the said William E. Karns, against the said George A. Porter, to try the title of the said respondent to the office of supervisor of the town of Albion, Orleans county, New York, upon the usual terms.

Dated, April 14, 1916.

GEORGE A. FISHER,
Third Deputy.

Approved and action ordered accordingly.

EGBURT E. WOODBURY,
Attorney-General.

In the Matter of the Application of JAMES W. REDMOND to the Attorney-General of the State of New York to begin an action to try the title of LUCIEN S. BAYLISS to the office of Justice of the Municipal Court of the city of New York, Borough of Brooklyn, Sixth District, for a term of ten years, commonly known as the "Long Term."

ELECTION LAW — APPLICATION FOR PERMISSION TO BEGIN ACTION TO TEST TITLE TO OFFICE OF JUSTICE OF MUNICIPAL COURT, CITY OF NEW YORK.

Facts presented by petitioner not sufficient to warrant commencement of action to try title to office of incumbent.

To the Attorney-General:

James W. Redmond of the Borough of Brooklyn in the county of Kings, city and State of New York, has petitioned the Attorney-General to bring and maintain an action in the name of the People of the State of New York, upon the relation of said petitioner against Lucien S. Bayliss to the office of Justice of the Municipal Court of the city of New York, Borough of Brooklyn, Sixth District, for a term of ten years, commonly known as the "Long Term," or that said petitioner be given leave to bring and maintain such action, and the matter was referred to the undersigned for hearing and report.

The Sixth Municipal Court District composed of parts of several Assembly Districts embraces 139 election districts. At the election in question there were more than 45,000 ballots cast.

A copy of the petition, together with a written notice that hearing would be held thereon at the office of the Attorney-General at the Capitol, Albany, N. Y., on Saturday, April 8, 1916, at ten o'clock in the forenoon, was personally served upon respondents.

By a written stipulation of counsel for the parties the hearing was adjourned to April 14, 1916, at 12 o'clock noon at the Attorney-General's office at which time and place a public hearing was held, Mr. Leander B. Faber appearing as counsel for the petitioner, with Hon. John T. Dooling of counsel, and Messrs. Meier Steinbrink and Henry W. Lewis appearing for the respondent.

Annexed to the petition were the affidavits of John T. Dooling and James A. Clynes in support of said petition.

Upon the hearing respondent filed a formal answer to the petition and a voluminous affidavit in support thereof made by William R. Dorman.

After argument by counsel for both parties Mr. Faber, appearing for the applicant, asked leave to submit further affidavits answering the affidavit of Mr. Dorman, which leave was granted, with the understanding that such answering affidavits should be served upon counsel for the respondent who might further affidavits answering any new matter contained in the new affidavits of relator.

Such new affidavits were submitted by both sides and the matter submitted for determination upon the affidavits as filed, each party submitting printed briefs.

From the petition, answer and affidavits it appears that the petitioner and the respondent were rival candidates for the office of Justice of the Municipal Court of the city of New York, Borough of Brooklyn, Sixth District, for the term of ten years commonly known as the "Long Term," at the general election held in and for the said district on the 2nd day of November, 1915, the petitioner having been nominated for such office by the Democratic and Independence League parties, and the respondent having been nominated for the said office by the Republican and Prohibition parties, and the official canvass of the votes cast for the office of said election as certified and declared by the city board of canvassers, showed the election of the respondent by a plurality of 64 votes over and above the total number of votes cast at said election for the petitioner Redmond; and on or about the 30th day of December, 1915, a certificate of election for the office of Justice of the Municipal Court, Sixth District, Borough of Brooklyn, city of New York, was issued to the respondent who forthwith qualified as such Justice of the Municipal Court, by taking the oath of office, and entered upon the performance of the duties thereof, and is now holding said office, and claiming to hold the same by virtue of said certificate of election.

A judicial investigation of the ballots cast at said election, which had been returned by the inspectors of election in the various election districts in the envelopes provided for void, protested and wholly blank ballots, was had pursuant to two orders of the Supreme Court, with the result that the plurality as indicated by

the count of inspectors of election and the board of city canvassers, was reduced from 64 to 62.

It appears that there were in all, in the envelopes provided for void and protested ballots, 103 of such ballots before the court, but that, as matter of fact, only 33 thereof were submitted to the court for examination and determination, the proper disposition to be made of the other seventy of such ballots having been agreed to by counsel for the contending parties. However, as all of such ballots were before the court pursuant to orders providing for their production and examination, and the parties having agreed as to the disposition to be made of the 70 of them, without actual examination and determination as to their validity by the court, it seems reasonable that the parties must be held to have waived any objection with regard to the 70 ballots not actually examined by the court and to be bound by the order of the court with regard to the ballots returned in the envelopes unless and until such order has been reversed by the Appellate Court.

On or about the 2d day of December, 1915, an order was granted by the Supreme Court, Kings county, providing that an examination be made pursuant to the provisions of section 374 of the Election Law, of all the ballots contained within the ballot boxes and cast at the general election held November 2, 1915, within the various election districts of the Sixth District of the Municipal Court District, of the Borough of Brooklyn, county of Kings, such examination to be made and had in the office of the board of elections in the Borough of Brooklyn, to commence December 6, 1915, at 10 o'clock in the forenoon, and to continue from day to day until completed; each party to this controversy to have one representative present at such examination, and that no other persons except the representatives of the board of elections of the city of New York and county clerk of the county of Kings, to be permitted to be present.

The examination provided for by said orders was held, and during the greater part of the time consumed in said examination the petitioner was represented thereat by Hon. John T. Dooling and for the remaining part of the time he was represented by James A. Clynes. The respondent was represented at said examination by William R. Dorman.

It appears that there was an understanding and arrangement made between the representatives of the contending parties at the examination, that each party was to call the attention of the other to each ballot to which objection was made, to the end that each party might make such record, notation or description of the ballot and its markings as he might conclude to be necessary and appropriate for use in any action or proceeding which might be determined upon at the close of the examination, and that each party did make or attempt to make such record.

It is alleged in the petition that on such examination it was found that in nearly every one of the 139 election districts comprising the Sixth Municipal Court District, the number of votes actually cast for both the petitioner and respondent, as revealed by said examination of the ballots, differed materially from the number of votes returned by the election officers as having been cast for such candidates in said election districts; that in many of said districts the respondent was credited by the returns of the inspectors with more votes than had been cast for him as found in boxes for voted ballots and in the envelopes containing the void and protested ballots; that in many of the said districts the petitioner had not been credited by the inspectors of election with the full number of legal votes which had been actually cast for him; that there were found in the boxes containing the voted ballots and in the envelopes containing ballots returned as void and protested, ballots which were properly marked and which should have been counted for petitioner but which were not counted for him.

Annexed to the petition is a tabulated statement, Exhibit "B," intended to show the discrepancies above referred to.

The force of these objections depends entirely upon the accuracy of the observation and count of the ballots in the ballot boxes upon the examination thereof pursuant to court order and the question is really embraced within the inquiry as to the condition of the voted ballots in the ballot boxes as revealed upon said examination.

The petition also alleges that in nearly every election district within the Sixth Municipal Court District there were found in the ballot boxes upon such examination ballots which had been canvassed, counted and returned by the inspectors of election for the respondent which had been improperly and unlawfully marked,

and which contained erasures, marks made in ink or with pencils having other than black lead, and ballots with holes, punctures or tears therein, or which were marked in a manner prohibited by the Election Law, and which were therefore void ballots and should not have been counted for respondent.

Annexed to the petition is a table, Exhibit "C," intended to show the number and description of said ballots claimed to be void and wrongfully canvassed and counted for respondent in each election district of the said Municipal Court District.

The petition also alleges upon information and belief that the aforesaid ballots improperly and unlawfully marked and containing erasures, holes, punctures and marks of identification, upon which votes had been counted for respondent by the inspectors of election, were protested and objected to by various watchers during the count and canvass of the vote on the night of election; but that, notwithstanding these protests and objections, the election officers in the said election districts had wrongfully refused to mark the said ballots as having been objected to, or as void in cases where the claim was made that such ballots were void, and had wrongfully failed and refused to enclose and return the said ballots in the envelopes provided by law for such purposes, but had unlawfully, improperly and fraudulently counted and canvassed said ballots for the respondent, and had placed same in the boxes for valid vote ballots where they were found and examined by the petitioner's representative acting under the order for the examination thereof obtained under the provisions of section 374 of the Election Law. But no proof, by the affidavit of any election officer or watcher or other person, of such misconduct or violation of duty in any election district was submitted by petitioner on the hearing. The allegation being on information and belief, the source of the information and the grounds for the belief not being disclosed in the petition or in any of the petitioner's affidavits, the presumption that the election officers, acting under their oaths, did their duty as required by the law, must prevail and it must be held as a fact for the purpose of this application, upon the proofs here presented, that none of the ballots found in the ballot boxes upon the examination had been objected to as void or protested as having been marked for identification at the time of the canvass thereof by the inspectors of election.

The petition also contains the general allegation upon information and belief that the votes cast for the office of Municipal Court Justice, Sixth District, Long Term, at said election were not truly counted as cast, but were unlawfully and erroneously, and in some instances, fraudulently canvassed, counted and returned by the inspectors of election to the prejudice of the petitioner. But as to this allegation no proofs whatever have been submitted by the petitioner and it must be held that no fraud has been shown.

Petitioner does not claim that more votes were actually cast for himself than were actually cast for the respondent. Exhibit "E," annexed to the petition, which is claimed by petitioner to be a tabulation of all of the votes cast for both candidates, shows that there were cast in all for the respondent, 19,317 votes, and for the petitioner, 19,255 votes, or a plurality of 62 votes for the respondent. Petitioner's claim is that of the 19,317 votes cast for the respondent, 909 thereof were invalid and void because of improper marking, punctures, tears, etc., and that only 18,408 of said votes were upon valid properly marked ballots, and that of the 19,255 votes actually cast for the petitioner the examination of the ballots in the ballot boxes and in the envelopes returned revealed that 648 thereof were void because of improper markings, tears, punctures, etc., and 18,607 thereof were upon properly marked valid ballots, making, as claimed by the petitioner, a plurality of valid votes in favor of the petitioner, of 199.

Petitioner's support for his contention is furnished by affidavits of his attorney, John T. Dooling, and of Mr. Dooling's clerk, Mr. James A. Clynes, who, so far as appears, is not an attorney. Mr. Dooling was at one time president of the board of elections of the city of New York, and is shown to have had large experience in election matters. As stated above, Mr. Dooling was present representing petitioner at the examination of the voted ballots in the boxes with reference to 125 election districts, and Mr. Clynes was present in the same capacity at the examination with reference to fourteen districts. Mr. Dooling and Mr. Clynes were not both present at any time during such examination. Petitioner has presented a table, verified as to correctness by the affidavits of Dooling and Clynes, which purports to be an analysis of the entire vote cast in the Municipal Court District, and to show the number of votes

cast for each candidate upon valid ballots and the number attempted to be cast upon void ballots in each election district embraced within the Sixth Municipal Court District.

Petitioner has also presented a table purporting to show the number of ballots cast in each election district upon which votes were marked for respondent, which ballots are claimed by petitioner to be void, together with the ground for such claim. The objections urged are that some of the ballots, the number in each election district being stated, bore voting marks outside the voting space, some bore evidences of erasures, some bore voting marks made with ink or other than black lead, some were punctured or torn and some had "other illegal marks." At the hearing it was objected upon the part of the respondent Bayliss, and I think properly, that the moving papers did not furnish such a description of the ballots complained of, or of the markings thereon, as would enable the Attorney-General to determine as to the validity thereof. To meet this criticism petitioner's counsel asked for and was granted leave to file additional affidavits and later did file an affidavit, verified on May 2, 1916, by Mr. Dooling, which purports to describe with particularity the Bayliss ballots to which objection is made, with illustrations of the "other illegal marks," which he claims render the ballots void. Mr. Dooling's affidavit attempts to deal with all of the election districts, whereas it appears that he was not present at the examination of January 3 and 4, 1916, and did not examine the ballots in the 6th election district of the 7th Assembly District, the 7th and 16th election districts of the 12th Assembly District, the 53rd and 61st election districts of the 16th Assembly District, and the 30th, 35th, 38th, 39th 44th, 53rd, 55th and 61st election districts of the 18th Assembly District, in which districts 89 of the ballots under attack were cast. This affidavit, therefore, is no proof of the invalidity of those eighty-nine ballots, and as the affidavit of Mr. Clynes, who attended for petitioner the examination of the ballots cast in those districts, furnishes no description of those ballots or of their claimed defects, there is no satisfactory evidence of such defects. However, as to 35 of such ballots, Mr. Dorman, respondent's representative, has admitted invalidity, leaving 54 thereof without sufficient proof of defect to warrant their exclusion from the count. Deducting this number, 54, from the number of Bayliss'

ballots claimed by petitioner to be void, 909, reduces the number of Bayliss' ballots subject to petitioner's attack as void, to 855.

I have very carefully examined and compared the claims of both parties as set forth in the affidavits with respect to these 855 ballots, and I find that as to at least 284 thereof Mr. Dorman has unqualifiedly denied their existence in such condition, and with such markings as Mr. Dooling has described and has given such a description thereof, as, if true, would prove them to be valid ballots. I am convinced that as to these 284 ballots the petitioner has not sustained the burden which should fairly rest upon him of furnishing that convincing proof of invalidity which would warrant the Attorney-General in bringing an action for the purpose of upsetting the declared result of an election, which, so far as the proofs show, was honestly conducted and was untainted by any fraud or direct charge thereof.

The examination of the ballots in the boxes was required by the order of the court to be conducted in the presence of the board of elections of the city of New York, in the membership of which both major political parties are by law required to be represented, and it should have been, and no doubt was, possible to obtain positive and convincing proof of the exact condition of each questioned ballot and the markings thereon; and the absence of corroborating evidence of petitioner's objections in the face of the respondent's denials seems to me should be fatal to petitioner's contention on an application of this nature. Our elections are surrounded by law with many safeguards calculated to insure fair elections and an honest count. The election boards are bi-partisan and political parties are entitled to have watchers present at all times from the opening of the polls to the completion of the counting of the votes and the certification of the result. Full opportunity is in this manner afforded to candidates and their party representatives to have every ballot whose validity is questioned separated from the rest of the ballots and returned in the sealed envelopes, so that it may, upon motion of any candidate, be subject to judicial examination and determination as to its validity. When this opportunity is allowed to pass and ballots are counted without objection according to the honest judgment of the inspectors of election, he who seeks after the completion of the canvass and certification of the result

to obtain a recount of the ballots and a redetermination of the result should furnish convincing proof of probability that such recount would produce a different result than that which has been reached and declared by the election officers.

If, then, from 855, the number of Bayliss' ballots attacked by Mr. Dooling remaining after deducting the 54 ballots, which Mr. Dooling did not have opportunity of examining, we deduct 234, the number thereof as to which I have concluded petitioner has not sustained the burden of showing invalidity, we have remaining 621, the number of Bayliss' ballots still subject to petitioner's attack. Were it to be found that petitioner had established the invalidity of all of those 621 ballots, and if that number were deducted from the total vote counted for Bayliss, 19,317, Bayliss would still have remaining 18,696 valid votes as against 18,607 valid votes claimed by petitioner to have been cast for Redmond.

In addition to the foregoing considerations it appears that upon the ballots used at the election in question there were in all ten sections containing the names of the nominees for offices other than that for which petitioner and respondent were candidates. This necessitated the handling of each ballot by the election officers many times, making it quite probable that some of them might become soiled, smudged or torn in the process of canvassing and counting and making them present quite a different appearance on the examination pursuant to court order, than when they were first opened in the presence of the election Board.

The election officers, acting under their oaths of office, and under the scrutiny of party watchers must be presumed, in the absence of evidence of fraud or misconduct, to have discharged their duty in accordance with the provisions of law made for their guidance and when their work has been completed, the results certified and announced, and certificates of election issued, actions at law to review their work and annul the results declared by them should not be lightly undertaken.

If a quo warranto action were brought and the more than 45,000 ballots cast in the election districts embraced within the Sixth Municipal Court District were brought before the court for re-canvass and recount, much other litigation might follow to test the titles to office of other persons certified and declared to have been

elected at the same election, a condition to be deplored and avoided if it can be avoided without denying the plain rights of the petitioner.

I conclude and therefore recommend that the petition be denied.

Dated, June 21, 1916.

SANFORD W. SMITH,
Second Deputy Attorney-General.

Approved June 24, 1916.

E. E. WOODBURY,
Attorney-General.

In the Matter of the Application of SAMUEL ROSENTHAL & BROTHERS to have the Attorney-General of the State of New York commence an action for the dissolution of the DAVID COHEN SILK COMPANY.

GENERAL CORPORATION LAW, § 101 — FAILURE TO PAY DEBTS.

Where a corporation has neglected or refused to pay judgment for considerably more than one year, but expects to recover judgment against one of its debtors, by which its assets will be so increased that it may meet the judgment, an action should not be begun for dissolution.

This is an application made by the above named petitioners for the commencement of an action in the name of the people against the above named David Cohen Silk Company, a domestic corporation, for dissolution thereof upon the grounds that it has neglected or refused for at least one year to pay and discharge its notes or other evidences of debt, and that it has suspended its ordinary and lawful business for at least one year.

The petitioner is represented by William Klein, of 346 Broadway, New York city. The respondent is represented by Olcott, Gruber, Bonyng & McManus, 170 Broadway, New York city.

FACTS.

The David Cohen Silk Company is a corporation organized under the laws of the State of New York, but is not actively engaged in business, and has not been doing any general business since August, 1913.

It is also alleged in the moving papers, and not denied by the respondent, that the following judgments were obtained at the times hereinafter mentioned and remain unsatisfied against the said David Cohen Silk Co., to wit:

One entered July 17, 1913, in favor of Samuel Rosenthal and Harris L. Rosen- thal for	\$619 23
One entered August 1, 1913, in favor of Astoria Silk Works for.	925 41
One entered January 14, 1914, in favor of New York Telephone Co. for.	44 80

It appears that an action was brought by David Cohen Silk Co. against Max M. Horowitz in the Supreme Court in the county of New York to recover the sum of \$2,478.04 and is still pending, and that if the plaintiff therein is successful in recovering the above amount it is claimed it will be more than sufficient to satisfy all the judgments which have been recovered against it.

An answer has been interposed by the defendant therein and recovery is contested.

It also appears that the said respondent had not up to June 21, 1916; filed any certificate in the Clerk's office of the city of New York showing payment of any capital stock from November 10, 1911, to such date by the David Cohen Silk Co.

REPORT.

This corporation has neglected or refused to pay the above mentioned judgments for considerably more than one year and it has suspended its ordinary business for over a year and is subject to an action for dissolution as provided by section 101 of the General Corporation Law, and it is apparent that such an action could be maintained by the Attorney-General for its dissolution, but if such an action should be brought and the corporation dissolved while its action is still pending against Mr. Horowitz it could not be continued except by a receiver, and the action might abate.

It was held in People vs. Troy Steel & Iron Co., 82 Hun. 302, that if actions were pending against a corporation at the time of a dissolution thereof in an action brought under Section 1785 of the

Code (now section 101 of the General Corporation Law) they could not be continued unless by order of the court; in any event, a dissolution of the corporation would raise many embarrassing questions as to the continuance of such action, and as both parties therein have the right to force an early trial of the issues raised therein, I think it is but fair that the commencement of an action to dissolve the corporation should be postponed until after the action brought by it against Mr. Horowitz is tried and finally disposed of.

The Attorney-General is not required to look into the merits of the action brought by this corporation against Mr. Horowitz, but the fact that such an action is pending is sufficient to justify a delay in the commencement of an action to dissolve the plaintiff therein until the determination thereof.

It is claimed by the respondent that if it succeeds in the action now pending against Mr. Horowitz and recovery is had the corporation will be possessed of sufficient funds to meet and discharge all of the judgments standing against it, and that the action was brought for the purpose of settling its affairs.

I therefore recommend that the application be denied, without prejudice to the petitioner to renew the same after the final disposition of the action now pending which was brought by the respondent against the said Max M. Horowitz.

Dated, August 12, 1916.

GEORGE A. FISHER,
Third Deputy.

Approved. Application denied but without prejudice to the petitioner to renew the same after the final determination of the action now pending in the Supreme Court, city of New York, brought by the David Cohen Silk Co. against Max M. Horowitz.

August 23, 1916.

E. E. WOODBURY,
Attorney-General.

In the Matter of the Petition of MARTIN H. MANION to the Attorney-General for the commencement of an action against PETER JOYCE to try the title of said Peter Joyce to the office of Chief of Police of the city of Johnstown, N. Y.

CIVIL SERVICE LAW, §§ 8, 9, 10 — CHARTER OF THE CITY OF JOHNSTOWN, CHAPTER 593, LAWS OF 1905; CHAPTER 660, LAWS OF 1910.

The chief of police of the city of Johnstown is the head of a department of the city government and is therefore in the unclassified civil service. Neither the State Civil Service Commission nor the city civil service commission had the power to place the position in the classified service. The respondent was accordingly lawfully appointed to office by the incoming mayor to succeed the petitioner.

Martin H. Manion has filed a petition praying that the Attorney-General commence an action against Peter Joyce to try the title of the said Peter Joyce to the office of Chief of Police of the city of Johnstown, N. Y., into which office the petitioner alleges that said Peter Joyce has unlawfully intruded and which office, as alleged, he has usurped, and now unlawfully holds and exercises.

The petitioner alleges in substance that the said Peter Joyce was on or about January 1, 1916, unlawfully appointed to the office of Chief of Police of the city of Johnstown by the Mayor of said city, without having first taken and passed a civil service examination pursuant to the terms and requirements of a rule or regulation adopted by the Municipal Civil Service Commission of said city, approved by the Mayor of said city and by the State Civil Service Commission, and in force and effect at the time of said appointment, transferring the position of Chief of Police of said city from the unclassified service to the competitive class of the classified service, and that the petitioner, who was the Chief of Police prior to and at the time of the appointment of the said Joyce, and whose term as such Chief of Police expired by the terms of the charter of said city on the 31st day of December, 1915, is, pursuant to the terms of said charter, entitled to hold over in said office and perform the duties and draw the salary thereof until a Chief of Police has been lawfully appointed pursuant to law and the said civil service rule and regulation.

Notice of the said petition and the filing thereof with the Attorney-General was given to the said Peter Joyce and a hearing thereon, pursuant to said notice, was held at the office of the At-

torney-General in the Capital at Albany, N. Y., on the 8th day of August, 1916.

The petitioner appeared in person and by Alfred L. Dennison of Johnstown, N. Y., his attorney.

Respondent appeared by F. E. Moyer, Esq., of Johnstown, N. Y., his attorney.

Respondent filed a written answer to the petition, denying that he had usurped or intruded into the office of Chief of Police of said city, and alleging facts and circumstances which he claimed establish the legality and validity of his appointment. Respondent also filed an affidavit of Borden D. Smith, Mayor of the city of Johnstown, showing the facts and circumstances with respect to the appointment of the respondent and corroborating certain allegations of fact stated and contained in respondent's answer.

Certain facts with respect to the matter were stipulated by counsel for the respective parties and permission was granted to the petitioner to file further affidavits answering any of the allegations of fact alleged in the respondent's answer and in the affidavit of the Mayor, with the privilege to respondent to file affidavits in answer to any such affidavits to be filed by petitioner, said affidavits to be served by each party upon the other coincidently with the filing thereof in this office. Both parties have submitted briefs in support of their several contentions.

The charter of the city of Johnstown as it existed prior to and on January 1, 1916, provided that the office the Chief of Police should be filled by appointment by the Mayor for a term expiring with the expiration of the term of office of the Mayor (chap. 660, Laws of 1910, sections 11 and 12). The petitioner had served several terms as Chief of Police, having been last appointed to that office by the then Mayor, Clarence W. Smith, whose term of office under the charter expired on December 31, 1915, Borden D. Smith having been elected Mayor at the general election held in the year 1915 for the term commencing January 1, 1916. During none of the time during which petitioner had held the office of Chief of Police had there been in force any rule or regulation of the Municipal Civil Service Commission of said city, placing or attempting to place the position of Chief of Police in the classified civil service, until on July 22, 1913, when the said Municipal

Civil Service Commission adopted a resolution or rule in the following language:

"Resolved, That subject to the approval of the mayor and State Civil Service Commission, the position of Chief of Police of the city of Johnstown, N. Y., be and the same is hereby transferred from the unclassified service to the competitive class of the classified service, competitive or non-competitive examination for said position being found to be practicable to determine the merit and fitness of the applicant."

which resolution was thereafter and on July 23, 1913, approved by the then Mayor of the city, and on July 29, 1913, was approved by the State Civil Service Commission. This resolution remained unrepealed and unrescinded on January 1, 1916, when the appointment of respondent to the office of Chief of Police was made by the present Mayor upon his assuming office.

In the month of December, 1915, after the election of the present Mayor, the petitioner personally applied to the Mayor-elect for reappointment to the office of Chief of Police, making at that time no claim that he was entitled to continue in such office or that the office was in the classified civil service. The present Mayor appointed the respondent to the office of Chief of Police without requiring the respondent to submit to any civil service examination, competitive or otherwise, no examination to develop an eligible list from which such appointment might be made having been held at any time, and there being therefore no such eligible list.

Prior to and at the time of respondent's appointment as Chief of Police, he was a policeman in the city, having been theretofore appointed as the result of a civil service examination previously held. Immediately upon and after his appointment on January 1, 1916, the respondent qualified and entered upon the discharge of the duties of his office and has continued to discharge such duties to the present time. Upon the appointment and qualification of the respondent as aforesaid, the petitioner surrendered to respondent his badge of office, together with all process in his hands, and all property of the city under his control as Chief of Police without objection.

On March 4, 1916, the Municipal Civil Service Commission of the city of Johnstown adopted a resolution in the following language:

"Resolved, That subject to the approval of the mayor of said city and subject to the approval of the State Civil Service Commission the resolution adopted by the Municipal Civil Service Commission of said city on the 22nd day of July, 1913, duly approved by the mayor of said city on the 23rd day of July, 1913, and duly approved by the State Civil Service Commission on the 29th day of July, 1913, whereby the position of Chief of Police of said city of Johnstown, N. Y., was transferred from the unclassified service to the competitive class of the classified service, is hereby revoked, cancelled and annulled, and the aforesaid position of Chief of Police of said city is hereby restored to the unclassified service of said city,"

which resolution was approved by the Mayor of the city on March 14, 1916, and approved by the State Civil Service Commission on March 16, 1916.

It is conceded that if the Municipal Civil Service Commission of the city of Johnstown had lawful authority and power to adopt and prescribe the rule which it in form adopted on July 22, 1913, placing the position of Chief of Police of that city in the competitive class of the classified service, the appointment of the respondent was contrary to law and invalid. By section 11 of the Civil Service Law, chapter 7 of the Consolidated Laws, the mayor of each city is required to appoint a Municipal Civil Service Commission to prescribe, amend and enforce rules for the classification of the offices, places and employments in the classified service of such city and for appointments and promotions therein and examinations therefor not inconsistent with the Constitution and the provisions of the Civil Service Law, such rules to be valid and take or continue in effect upon the approval of the Mayor of the city and of the State Civil Service Commission.

By section 8 of the Civil Service Law, it is provided that it shall be the duty of all officers of the State of New York or of any civil division or city thereof to conform to and comply with and to aid in all proper ways in carrying into effect the provisions of that law

and the rules and regulations prescribed thereunder and any modification thereof. It is further provided that no officer or officers having the power of appointment or employment shall select or appoint any person for appointment, employment, promotion or reinstatement, except in accordance with the provisions of the Civil Service Law and the rules and regulations prescribed thereunder. By paragraph 3 of Rule III of the State Civil Service Commission, which by section 6 of the Civil Service Law is given the force and effect of law, it is provided:

“No person shall be appointed to or employed in any position in the classified service of the State or of any city or political division thereof for which rules have been prescribed pursuant to the provisions of the Civil Service Law, until he has passed an examination, or is shown to be especially exempted from such examination, in accordance with such rules and the provisions of the Civil Service Law.”

The Municipal Civil Service Commission therefore having adopted a rule placing the position of Chief of Police in the competitive classified service, and such rule and regulation having received the approval of the Mayor and of the State Civil Service Commission, the Mayor, in filling the office of Chief of Police was bound by law to obey the rule if the Municipal Civil Service Commission had power to adopt and prescribe it.

The respondent contends that the Municipal Civil Service Commission had not that power for the reason that the Chief of Police of the city of Johnstown is the head of a department of the city government, to wit, the Police Department; that heads of departments are placed by section 9 of the Civil Service Law in the unclassified branch of the civil service; and that the Municipal Civil Service Commission has power and authority under the law to adopt rules and regulations with respect to the classified service only. It is conceded that heads of departments are placed by section 9 of the Civil Service Law in the unclassified service and that Municipal Civil Service Commissions have no authority under the law to prescribe rules and regulations to govern appointments and promotions in the unclassified service, but petitioner contends that the Chief of Police of the city of Johnstown is not the head of a department of government, which is the important question to be determined.

To determine that question we must examine the provisions of the charter of the city. The charter, chapter 593 of the Laws of 1905, has a separate article devoted to the Police Department, being Article VIII, entitled: "POLICE DEPARTMENT." Section 190 of the charter included within Article VIII, on January 1, 1916, provided as follows:

"Section 190. Police Department, How Constituted: Rules and Regulations.—The Police Department shall consist of the Chief of Police and four uniformed policemen, who shall constitute the regular police force, and such special policemen as may be appointed under the provisions of this article. The police department shall be under the general control and management of the mayor and common council, who shall adopt and enforce rules and regulations consistent with law, for the administration of the affairs of such department, and for the government of its members. A sufficient number of such rules and regulations shall be printed for the use of the department."

Section 194 also included within Article VIII, provided as follows:

"Section 194. Powers and Duties of Chief of Police. The Chief of Police shall:

I. Subject to the authority of the mayor and common council, be the chief executive officer of the Police Department and superintend the same;

II. Record all cases and legal proceedings in his department and all services performed by him and by the several policemen in a book to be provided for that purpose;

III. Enter all articles taken from persons arrested or seized on a warrant or otherwise together with the disposal made thereof in a book to be known as the Property Book;

IV. At least once a month or oftener if required, report to the common council the state of the department and whether the members of the department are delinquent in their duties, and account for all fees received for services performed by the members of the department."

Under the power and authority conferred by section 190 of the charter above quoted, the common council with the approval of the Mayor had, on January 27, 1896, adopted, published and promulgated rules and regulations for the government and discipline of the Police Department, which rules and regulations remained unrescinded and unrepealed, and therefore in effect on January 1, 1916.

Among such rules and regulations are the following, relating to the office of Chief of Police:

“Section 1. I, the Chief of Police, under the direction of the Mayor and common council, shall have the general superintendence of the police force and take charge of all property belonging to the department. It shall be his duty to see that all the members of the force are properly attired and equipped and cleanly in person and clothing; that they are well instructed in their duties and perform them, and he shall be responsible for their general deportment, good order and efficiency as a police force, and when on duty shall be clothed in uniform.

II. It is the duty of the chief to see that the ordinances of the city are properly enforced and that the police regulations are maintained.

III. The chief shall promptly repair to the scene of every fire, riot or threatened disturbance, with an adequate force to guard the firemen from annoyance and assist them, if need be, to save and protect property and arrest thieves or disorderly persons.

IV. He shall keep the following books and records: A book to be called the “Record of Arrests,” containing the names of parties arrested, the offense, name of complainant, name of arresting officer, when and where arrested, and what disposition is made of the same. Said book shall state what property or effects were found on the person of party arrested; said book shall also contain a record of all accidents which may occur within the city of Johnstown, of whatever character, to man or beast, that shall come to the knowledge of any of the

policemen, and it shall at all times be open to authorized newspaper reporters.

V. A book to be called the "Record of Tramps," containing the names of all tramps, giving age, height, color, nationality, occupation and such other characteristics as may be especially noticeable.

VI. A book to be called the "Record of Lost and Stolen Property," containing a record of all property alleged to be stolen or embezzled which may be brought into the police office, and all property taken from the person of a prisoner, and all property alleged or supposed to have been feloniously obtained, or which shall be lost or abandoned and which shall be taken into the custody of any member of the police force or criminal court of the city of Johnstown, the name of the owner, if ascertained, the place where found, the name of the person from whom taken, with the general circumstances. And the chief shall take charge of said property and take a receipt therefor, under the same book, whenever the same shall be delivered up to any person.

VII. A "Street Light Book," which shall contain a record of all defective street lamps, with their location.

VIII. A book containing the name of each police officer, his place of residence, when appointed to the force, when dismissed and for what cause, neglect of duty or breach of the rules, or any meritorious services performed.

IX. A record of the services of each member of the police force, and any absences from duty and the causes thereof, and any delinquency in promptly reporting for duty, with the excuse, if there be any.

X. The chief shall report to the Mayor and common council without delay any instance of insubordination, neglect of duty, drunkenness, lewdness, undue violence in making arrests, abuse of prisoners, or any other offense or violation of rules, and the Mayor may suspend the offending member from duty until the next meeting of the common council. The chief shall also make to the common council a monthly report of the condition of the property in his charge and of the force under his superintendence, and of all cases of incompetency, inefficiency,

ency or meritorious service on the part of any member, with a statement of the time served and lost by each member of the force during the preceding month, with the cause of such loss of time. He shall at the same time make a report of arrests that have been made, and by whom, and a full list of all property, recovered or taken from prisoners, remaining in his hands.

XI. He shall also report immediately to the Mayor or chairman of the police committee any unusual occurrence or other matter that may require the immediate attention of the common council."

The discipline of the police force is provided for in section 4 of said rules and regulations as follows:

"Section 4. Any member of the police force who shall prove to be incompetent or inefficient in his office, or who shall be guilty of disobedience or disrespect to his superior officer, or who shall be intoxicated, or visit any gambling house, brothel or other disreputable place, except in the discharge of his duty, or who shall use profane or obscene language, beat or bruise a person unnecessarily in making an arrest, maltreat a prisoner, take or offer to take any money or other valuable thing for compounding an offense, or for performing or neglecting to perform his duty, or who shall violate any of the rules of this department, shall be subject to reprimand, suspension without pay, or dismissal from the force, in the discretion of the common council."

I do not find that the term "head of department of government" as that term is employed in section 9 of the Civil Service Law, has been defined by the courts but the plain language of the charter of the city creating a separate department of police, and providing that the Chief of Police shall be the chief executive officer thereof and shall superintend the same, leaves no room for doubt that he is the head of that department. That he is subject to the authority of the Mayor and common council in respect of his control of the policemen under him, I do not think at all controlling. While section 190 of the charter provides that the police department "shall be under the general control and management of the Mayor and common council who shall adopt rules and regulations consistent

with law for the administration of the affairs of such department and the government of its members," the rules and regulations so adopted provide that the Chief of Police "shall have the general superintendence of the police force and take charge of all property belonging to the department," under the direction of the Mayor and common council, and that it "shall be his duty to see that all members of the force are properly attired and equipped and cleanly in person and clothing, that they are well instructed in their duties and perform them, and he shall be responsible for their general deportment, good order and efficiency." The chief is also by such rules required to see that the ordinances of the city are properly enforced and the police regulations maintained, and to keep the records of the department and of the members of the police force.

By section 194 of the charter certain duties are specifically imposed upon him. By section 10 of the charter he is declared to be a city officer, and by section 19 and 20 he is required to take and file an official oath, and an official bond, before entering upon the duties of his office.

A former Attorney-General held that the Chief of Police of the city of New York was one of the heads, that is the executive heads, of the police department of that city, although the charter of the city (L. 1882, Ch. 410, as amended by L. 1895, Ch. 569) provided that the board of police consisting of four police commissioners should be the head of the police department, and enumerated the Chief of Police as one of the police force, not calling him an officer of the city, but declaring him to be the "Chief Executive officer of the force." (Opinion of Attorney-General, 1897, p. 276.)

I conclude that the Chief of Police of the city of Johnstown is the head of a department of the city government, that the position is therefore in the unclassified service, and that the resolution of the Municipal Civil Service Commission adopted on July 23, 1913, attempting to place the position in the classified service was beyond

their power and was and is a nullity, and that the present Mayor acted within his lawful powers when on January 1, 1916, he appointed respondent to that office.

RECOMMENDATION.

I recommend that the prayer of petitioner be denied.

Dated, October 14, 1916.

SANFORD W. SMITH,
Second Deputy Attorney-General.

Approved October 18, 1916.

E. E. WOODBURY,
Attorney-General.

In the Matter of the Application of OTTO E. GOEBEL for the commencement of an action for the dissolution of CONSOLIDATED FILM Co. of New York.

This is an application made by Otto E. Goebel to the Attorney-General to commence an action pursuant to the provisions of Article VI of the General Corporation Law for the dissolution of the Consolidated Film Company of New York.

APPEARANCES.

Arthur Butler Graham, attorney for petitioner, 165 Broadway, New York, with Robert C. Poskanzer of Albany, as counsel.

No appearance by the respondent.

GENERAL CORPORATION LAW, ARTICLE VI — DISSOLUTIONS — CONSOLIDATED FILM COMPANY.

Where a corporation has remained insolvent for at least a year and has neglected or refused for at least a year to pay its debts and has suspended its ordinary and lawful business for at least a year, an action for dissolution should be brought.

FACTS.

The above named Consolidated Film Company of New York was duly organized and incorporated under and by virtue of the Laws of the State of New York, by a certificate of incorporation

filed in the office of the Secretary of State on or about the 11th day of March, 1907.

That between the 24th day of April and the 2nd day of July, 1909, the above named respondent became indebted to Joseph F. Coufal for the rental of certain song slides to the amount of \$30.00 and the account for the same was duly assigned to the petitioner by the said Coufal before the commencement of this proceeding, and the same has since remained wholly due and unpaid, after repeated demands have been made for the payment thereof, and is still owned by this petitioner.

It is also alleged in the moving papers, upon information and belief, that on or about October 25, 1909, an involuntary petition in bankruptcy was filed against the said respondent in the U. S. District Court, Southern District of New York, in which the insolvency of the respondent was alleged, but the proceeding was afterwards suspended or dropped and was never carried through to a final settlement of the estate and the said respondent was never discharged from its debts.

It is further alleged upon information and belief, by the petitioner, that the respondent ceased to do any business upwards of five years ago and has done no business since that time. This fact is corroborated by a letter from Leon Kaufman, one of the former attorneys for said Consolidated Film Company, dated September 22, 1916, in which he stated that from his knowledge, the said company had ceased to do business upwards of five years before the date of such letter.

Copies of the petition, exhibits and notices were duly served on Jules E. Mosheim, the president of the said Consolidated Film Co. of New York, several days before the return date of the notice, but the said Mosheim, or any other person representing said company, failed to appear upon such hearing, and neither said Mosheim or any other person representing the said company, made any denial of the allegations or the facts hereinbefore set forth.

CONCLUSIONS.

I deem it sufficiently established by the foregoing undenied facts that the said Consolidated Film Company—

1. Has remained insolvent for at least a year;
2. That it has neglected or refused for at least a year to pay its debts;
3. Has suspended its ordinary and lawful business for at least one year, and that an action can be maintained for its dissolution, as provided by section 101 of the General Corporation Law.

I do, therefore, recommend that an action be brought, in the name of the People, against the said Consolidated Film Company of New York, for the dissolution of said company.

Dated, December 13, 1916.

GEORGE A. FISHER,
Third Deputy.

Approved.

EGBURT E. WOODBURY,
Attorney-General.

By MERTON E. LEWIS,
First Deputy.

Before the Attorney-General.

In the Matter of the Application of OTTO E. GOEBEL for the Commencement of an Action for the Dissolution of the Consolidated Film Co. of New York.

On reading and filing the report of George A. Fisher, Third Deputy, in the above-entitled matter, which has been duly approved by me, I do hereby order and direct that an action be commenced by the People of the State of New York against the above-named Consolidated Film Co. of New York to dissolve the said corporation upon the grounds named in said report, upon the petitioner, Otto E. Goebel, executing and filing in this department a bond in the penal sum of \$250 to protect and save the People harmless from all costs and expenses of such action; and Arthur Butler Graham, 165 Broadway, New York city, is hereby designated to commence and prosecute such action in my name as

Attorney-General, upon his assenting to the stipulation attached to said bond.

Dated, December 12, 1916.

E. E. WOODBURY,
Attorney-General.

By MERTON E. LEWIS,
First Deputy.

In the Matter of the Application of ANDREW NEWCOMB for the Commencement of an Action to Restrain the St. Ann's School of Industry and Reformatory of the Good Shepherd from Alleged Violations of the Prison Law.

STATE CONSTITUTION — INDUSTRIES IN INSTITUTIONS.

Where a church industrial school and reformatory is doing laundry work for various persons, private families, hotels, restaurants and clubs outside of the institution, it is not violative of the statutes and the Constitution of this State prohibiting competition by prison labor with free labor.

It is alleged in the petition in the above-entitled matter that the above-named School of Industry and Reformatory is doing laundry work for various persons, private families, hotels, restaurants and clubs outside of the institution "and thereby bringing prison labor into competition with free labor in violation of the laws of the state of New York," and the Attorney-General is asked to commence an action to restrain such alleged violation.

Upon the return day of the notice the following appearances were made:

The petitioner, by Lewis Cass.

The respondent, by John T. McDonough.

Messrs. Staley & Tobin, as counsel for Catholic institutions in general, which may be affected by this proceeding.

Edmund J. Sweeney for the House of the Good Shepherd at Troy.

Preliminary objections were made to the proceeding upon the ground that the Prison Labor Law does not apply to this institu-

tion, or those institutions which are organized and incorporated in a similar manner.

MEMORANDUM

St. Ann's School of Industry and Reformatory of the Good Shepherd is a domestic corporation organized and incorporated pursuant to the provisions of chapter 319 of the Laws of 1848 and the several acts amendatory thereof, and was so incorporated by a certificate filed and entered in the office of the Secretary of State on the 20th day of October, 1887. The purposes expressed therein are as follows:

"To maintain a charitable, industrial school, and to instruct the inmates thereof in such branches of industry and education as may fit them for useful trades and occupations; to work for the reformation of fallen, and the preservation of weak women; and to save, care for, educate and correct wayward and corrupt children."

The incorporation was duly approved by the State Board of Charities, and has always been under the supervision of such board. It is a private corporation and charitable institution.

By chapter 144, Laws of 1899, authority was given to committing magistrates, including justices of the peace, police justices and all courts having criminal jurisdiction in the several counties of the State, except the counties of New York and Kings, to commit a certain class of females mentioned therein, over 12 years of age, not insane or mentally or physically incapable of being benefited by the discipline of the institution, to the above-named St. Ann's School of Industry and Reformatory of the Good Shepherd at Albany, for the term of six months. If the female should be a minor she could be committed during her minority.

Pursuant to the provisions of the last above act, fallen and degenerate females have since been committed to the above-mentioned school. It is stated that there are now some fifty inmates of the institution, and it is alleged that for many years the labor and product of the labor of the inmates thereof have been sold and contracted to outside parties in violation of law.

For many years prior to 1894 an agitation had been in progress against the competition of prison labor with what was termed

"free labor." As it grew in intensity the subject was considered on several occasions by the Legislature and several bills were passed from time to time, either limiting the output from the prisons or prohibiting the manufacture therein of certain kinds of commodities. The protests came from labor unions, manufacturers, merchants, etc., and continued so persistently that the whole subject was taken up by the Constitutional Convention of 1894, exhaustively considered, and resulted in the adoption of section 29 of article III of the Constitution.

I have read the debate and proceedings which preceded the adoption of the above-mentioned provision of the Constitution and it is very apparent that the "Prison Labor" therein referred to was only intended to apply to labor within the several State prisons, penitentiaries, jails and reformatories owned by the State and counties, and was not intended to apply to the labor of the inmates of private corporations or charitable institutions.

Section 29 of article III of the Constitution, as finally adopted, reads as follows:

"Prison labor; contract system abolished.—§ 29. The Legislature shall, by law, provide for the occupation and employment of prisoners sentenced to the several State prisons, penitentiaries, jails and reformatories in the State; and on and after the first day of January, in the year one thousand eight hundred and ninety-seven, no person in any such prison, penitentiary, jail or reformatory, shall be required or allowed to work, while under sentence thereto, at any trade, industry or occupation, wherein or whereby his work, or the product or profit of his work, shall be farmed out, contracted, given or sold to any person, firm, association or corporation. This section shall not be construed to prevent the Legislature from providing that convicts may work for, and that the products of their labor may be disposed of to, the State or any political division thereof or for or to any public institution owned or managed and controlled by the State, or any political division thereof."

It has become necessary in the logical order of this discussion to study the provisions of the above section, in the light of the pur-

poses for which it was adopted, to see if it can be reasonably extended to cover the work and labor performed in institutions like the St. Ann's School of Industry and Reformatory of the Good Shepherd. Certainly the words "State Prisons," "Penitentiaries" and "Jails" cannot be held to include the above-mentioned school or any other of like character, and unless they were made subject to its provisions, by use of the word "Reformatories," they are clearly outside of the limitations provided in such section.

It is not disputed that the above-mentioned school, as well as several other private charitable institutions, are doing reform work, and were established for the purpose of saving and reforming fallen women and degenerate children and to educate and reclaim them if possible, to fit them for useful lives. The inmates thereof are not generally committed to such institutions for the purpose of punishment, but to bring about their reclamation and to elevate them for higher spheres of life. Compulsory confinement in any place, either in prisons or charitable institutions, is to some degree a punishment — still the paramount and leading purpose is to educate and inspire the inmates with higher ideals of life, to better and more noble purposes and to save them, so far as possible, from lives of criminality. While this work is all along the lines of reformation, the institutions doing this kind of work are not generally known as "Reformatories" in the classification of the private and public institutions within the State.

The word "Reformatory," in connection with penal institutions of the State, first crept into the statutes upon the establishment of the State Reformatory at Elmira. (Chapter 427, Laws of 1870.) The purposes for which that prison was established were twofold, viz.— punishment and reformation of the inmates, and only first offenders, between the ages of 16 and 30, were allowed to be committed thereto. The governor was authorized to appoint five persons to act as a board of managers thereof and the board was known as the "Board of Managers of the State Reformatory at Elmira." After the establishment of the Eastern New York Reformatory at Napanoch (chapter 336, Laws of 1892) the language of the statutes changed to the "State Board of Managers of Reformatories" and since that time the word "Reformatories" has

been generally used in all statutes relating to the prison law. I think it is pretty well established by following the trend of legislation and the debate at the time of the adoption of the above-mentioned provision of the Constitution, that the word "Reformatories," as used therein, was intended to apply solely to reformatories owned and managed by the State for penal and reform purposes.

Following the adoption of the Constitution, and in 1896, the Legislature made several amendments to the Prison Law and the present section 170 of the Prison Law was enacted, which reads as follows:

"§ 170. Contracts prohibited.—The superintendent of state prisons shall not, nor shall any other authority whatsoever, make any contract by which the labor or time of any prisoner in any state prison, reformatory, penitentiary or jail in this state, or the product or profit of his work, shall be contracted, let, farmed out, given or sold to any person, firm, association or corporation; except that the convicts in said penal institutions may work for, and the products of their labor may be disposed of to, the state or any political division thereof or for or to any public institution owned or managed and controlled by the state, or any political division thereof."

It will be observed that the Legislature followed quite closely the language of the Constitution, and after specifying State prisons, reformatories, penitentiaries and jails, later refers to them as "penal institutions." Can it be claimed that the Legislature intended that section to apply to charitable and benevolent institutions doing reform work, simply because some persons charged with minor offenses can be committed to them?

In chapter 737, Laws of 1894, chapter 586, Laws of 1888, and in several other acts and provisions in connection with prison labor, the Legislature refers to the "penal institutions of the State," indicating most strongly, to my mind, that it did not intend to include private reformatories in the several statutes relating to prison labor; and it is very evident that the several Legislatures which have legislated upon the subject of prison labor since the adoption of section 29 of article III of the Constitution, did not

treat or consider such private reformatories as falling within the inhibition of the Constitution so far as it concerned the labor or product of the labor of their inmates, and that the term "penal institutions of the State" was used to distinguish the State prisons, penitentiaries, jails and penal reformatories from the other institutions within the State which have been or may be established for the purposes of both reformation and punishment, whether such reformatories are owned by the State or some private corporation.

The construction of the Legislature of the above-mentioned provision of the Constitution is further illustrated by the provisions of section 171 of the Prison Law, which reads as follows:

"§ 171. Prisoners to be employed; products of labor of prisoners.—The superintendent of state prisons, the superintendents, managers and officials of all reformatories and penitentiaries in the state, shall, so far as practicable, cause all the prisoners in said institutions, who are physically capable thereof, to be employed at hard labor, for not to exceed eight hours of each day, other than Sundays and public holidays, but such hard labor shall be either for the purpose of production of supplies for said institutions, or for the state, or any political division thereof, or for any public institution owned or managed and controlled by the state, or any political division thereof; or for the purpose of industrial training and instruction, or partly for one, and partly for the other of such purposes."

Attention is called to the last sentence "or for the purpose of industrial training and instruction, or partly for one, and partly for the other of such purposes." Certainly if section 29 of the Constitution was intended to prohibit all kinds of work in all public and private institutions within the State, excepting only work for the State or for some political subdivision thereof, the last sentence of section 171 was clearly violative of the Constitution. It would seem that the Legislature had in mind the institutions within the State where reformation, industrial training and instruction are a part of the purposes for which they are or may be established, and that such institutions were not considered to be within the inhibition of the Constitution.

It was held in *Brouck v. Riley*, 181 State Reporter, 179-187, that the words "penal institutions of the state," used in chapter 586 of the Laws of 1888, prohibiting the use of motive power in such penal institutions, did not include any other than the State prisons and such other prisons and reformatories as are constructed by the State and maintained at State expense. This decision arose out of a contract made between the superintendent of the Albany penitentiary and one Brouck. The court held that the language of the statute, "penal institutions of the state," was not broad enough to include such penitentiary and its provisions could not be extended by implication. Section 29 of article III of the Constitution was afterwards adopted, and made broad enough to include jails and penitentiaries, largely on account of the ruling in the above case, it is claimed.

But very little work is done in the jails in the State as compared with the large amount that is done in the various private and public charitable institutions and reformatories with the State, and it is fair to assume that if the Constitutional Convention had intended to restrict the labor of such correctional institutions to work only for the State or some of its political divisions, that there would be some word or words therein which would clearly and definitely include them without leaving it to doubtful construction of the word "reformatories."

The constitutional restrictions upon labor in any of the institutions of the State, is wholly embraced in the above-mentioned section 29 under the title of "prison labor, contract system abolished." By sections 11 and 14 of article VIII of the Constitution all institutions of a charitable, eleemosynary, correctional or reformatory nature, whether State, county, municipal, incorporated or not incorporated, including all reformatories except those in which adult males convicted of felony shall be confined, are subject to visitation and inspection by the State Board of Charities.

The State reformatories at Elmira and Napanoch are not visited or inspected by the State Board of Charities, but are left entirely to the supervision and control of the prison officials and are clearly subject to the labor restrictions of the Constitution and acts of the Legislature in relation to prison labor. I do not think such restrictions were intended to apply to the charitable reformatories

and institutions within the State, even if such reformatories are clothed with power to receive prisoners convicted of misdemeanors and the minor offenses and are partly punitive and partly charitable or educational, as they are not what can be called purely "penal institutions of the state," but even if the State public charitable institutions, such as the House of Refuge at Randall's Island, Industrial School, Rochester, New York State Training School for Girls at Hudson, House of Refuge for Women at Albion, State Farm for Women at Valatie and New York State Reformatory for Women at Bedford, are subject to the restrictions of the Constitution as to the labor of the inmates thereof, it cannot be successfully argued that the labor of the inmates of private charitable institutions is also subject to such restrictions.

I am informed that while the inmates of the above-named public reformatories are kept employed at some useful and educational industries, the products of their labor are used entirely within the institutions where the work is done, or to a very limited extent in some other of the public institutions of the State, and are never sold or contracted to outside parties, and that the State Board of Charities has never considered that the work or product of the labor of such institutions was subject to the restrictions of the Constitution.

The numerous private, charitable institutions of the State, like the St. Ann's School of Industry, are all subject to the visitation and inspection of the State Board of Charities, but the labor and product of the labor of the inmates of such institutions have never been treated as subject to the restrictions and limitations provided by the Constitution. These private homes and schools are supported in part by local municipal assistance, in part by philanthropic contributions and in part by the labor of the inmates who are physically capable. In many of them, if not all, they are kept at work at some useful employment, such as washing, laundering, knitting, sewing and other work which will tend to teach and fit them for the various activities of life after their release, and at the same time to create and cultivate within them a desire for cleaner and better lives,—in short, to educate and reform; so far as practicable, the weak, fallen and wayward and those that are inclined to criminality and dissipation. None of the hardened,

incorrigible women, or those convicted of felonies, are ever sent to these private institutions. They are only used for the confinement of those convicted of some minor offenses where reclamation is deemed possible.

The construction given to the Constitution by the State Board of Charities and acquiesced in by the public for the last twenty years and upwards, is entitled to great weight and consideration in the decision of this question. It is a well-established rule that long practical construction and uninterrupted practice by a public body which is charged with the duty of enforcing and administering a public statute, should not be lightly disregarded.

Power v. Village of Athens; 26 Hun, 287.

Easton v. Pickersgill et al., 55 N. Y. 310,

Grinmer v. Tenement House Department of N. Y.,
205 N. Y. 549-550.

People ex rel. Werner v. Prendergast, 206 N. Y. 411.

The interpretation placed upon the above-mentioned provision of the Constitution by the State Board of Charities relative to these private charitable institutions, has been adopted and acquiesced in by the prison department, the Legislature and general public ever since the adoption thereof in 1894. Despite the fact that the same kind, or similar work, has been done in many of such institutions since that time, the right has never been questioned heretofore that I am aware of, and such practice should not be interrupted after all these years except upon the clearest direction to that effect by the Legislature.

The attorney for the petitioner herein does not deny that the St. Ann's School is under the inspection of the State Board of Charities, but claims that notwithstanding that fact, it is subject also to the limitations of section 29 of article III of the Constitution as to the labor or product of the labor of the inmates thereof, because it was authorized by chapter 144, Laws of 1899, to receive females over 12 years of age committed thereto, charged with prostitution, vagrancy, petit larceny or any misdemeanor, who are capable of being benefitted by the discipline of the institution. If his construction is correct, then all such private charitable institutions are made subject to the prison law. We find by examination of the reports of the several superintendents of State prisons

for the last ten years, that none of them have made any report of the inmates of St. Ann's School, or given direction as to the kind of work that shall be done or allowed to be done by them. By section 181 of the Prison Law it is made the duty of the Superintendent of State Prisons to distribute among the penal institutions under his jurisdiction the labor and industries thereof, and the general management of the machinery and the kinds of occupation to be pursued in each prison and he "shall annually cause to be procured and transmitted to the Legislature, with his annual report, a statement showing in detail the amount and quantity of each of the various articles manufactured in the several penal institutions under his control and the labor performed by convicts therein, and the disposition thereof,"— and yet, notwithstanding these express statutory provisions, I do not find any report of the St. Ann's School either as to supervision thereof by the superintendent, or of the kind of work done by the inmates. The reason is obvious. The St. Ann's School of Industry and Reformatory of the Good Shepherd is not a penal institution of the State and is not subject to the restrictions of the Constitution or to the control or supervision of the Superintendent of State Prisons.

My attention is called to the case of Corbett v. St. Vincent's Industrial School, 177 N. Y. 16, as an authority for the maintenance of such an action as is asked to be commenced against this institution. That was an action brought by the plaintiff to recover damages for an injury sustained by him while under commitment to the last above-mentioned school. The court held in substance that "inasmuch as the defendant, in receiving and taking charge of the plaintiff, was exercising functions which, in a large sense, belonged to the State, it cannot be held liable for accidents of this character."

The Court further said:

"That is one of the functions of government which the state may exercise and which it may *delegate to charitable institutions* created under its laws; and for the purpose of taking care of the morals of the youthful delinquent himself. In other words it thought to be wise to send boys of that age to this institution rather than confine them in the state prisons or county jails, where they would necessarily mingle with older and more hardened criminals. * * *."

"The plaintiff was really a prisoner in the custody of the defendant, deprived of his liberty, and all his conduct and movements subject to such regulations as the defendant might reasonably prescribe, just as in the case of convicts in the prisons or jails of the state. In the interest of humanity it was thought to be wise to subject such young boys to a milder punishment than is meted out to older criminals. It was the duty of the defendant, having decided to receive the plaintiff into custody, to subject him to such care and discipline as would be likely to produce a reformation in his life, and to this end his employment at some useful labor was thought to be, and doubtless was, necessary. The defendant is in no sense a business enterprise; it has no stockholders and is not organized for money-making purposes. The fact that it has a farm, upon which it employs boys confined in the institution to some extent, does *not change its character as a charitable institution.* It appears that there were something less than two hundred boys in the institution at the time this accident happened; they were sent there, just as the plaintiff was, from various counties in the state. It is not at all likely that the institution could support these boys upon the small pittance of two dollars a week, or less, as it was in some cases. Their proper support was derived from the farm and some other industries where the labor of the inmates could be utilized, and, of course, the proper care of their clothing rendered it necessary to keep and maintain a laundry. If, while working in that laundry upon a machine, the plaintiff was injured, as the record shows that he was, the result is doubtless unfortunate, but it is obvious that the defendant cannot be made liable in damages for the injury."

It is also stated in such opinion that the product of the labor of the inmates of St. Vincent's Industrial School was not sold unless there was a surplus and was not for the public or for anyone outside of the institution, but there is no intimation by the Court that if the articles manufactured, or the laundry work had been done for anyone outside of the institution, that it would have been in violation of the Constitution or of any statute.

I have examined every authority cited by the able lawyers who have appeared in this proceeding, and I am unable to find any

case where the question here involved has been passed upon, and so it must be decided upon the Constitution and the statutes without the aid of judicial interpretation, and it seems apparent to me that the revisers of the Constitution and the Legislature intended to and have drawn a clear distinction between convict labor as performed in the State prisons, and other penal institutions of the State, and the labor of the inmates of charitable institutions, particularly private, charitable institutions, and this distinction seems to be so clearly drawn and plainly stated, that all doubt is eliminated as to the intention of both bodies. I do not think the State or the St. Ann's School of Industry and Reformatory of the Good Shepherd should be embroiled in a litigation to settle a question which must inevitably lead to the defeat of the State.

In reaching this conclusion, I have assumed that the work stated in the petition is actually being done at the institution complained of, and that if an action were brought, the fact could be easily established.

I do not conceive it to be my duty to advise the Attorney-General to commence or allow to be commenced, in the name of the People, an action to restrain or prohibit the St. Ann's School of Industry and Reformatory of the Good Shepherd from doing a thing which it appears to have a valid and legal right to do for the purpose of endeavoring to obtain a construction of the constitution contrary to its plain import; contrary to the whole trend of legislation since its enactment; contrary to the established practice by the boards and departments charged with its enforcement; contrary to the long acquiescence of the public and contrary to my firm convictions in the matter, after an exhaustive and unbiased consideration of the whole subject.

I, therefore, recommend that the proceeding be dismissed.

Dated, December 13, 1916.

(Signed) GEORGE A. FISHER,
Third Deputy.

Approved:

(Signed) EGRURT E. WOODBURY,
Attorney-General.

By MERTON E. LEWIS,
First Deputy.

Before the Attorney-General.

In the Matter of the Application of ANDREW NEWCOMB for the commencement of an action to restrain the St. Ann's School of Industry and Reformatory of the Good Shepherd from alleged violations of the Prison Law.

On reading and filing the report of George A. Fisher, third deputy, dated December 13, 1916, from which it appears that an action cannot be maintained for the purposes stated in the petition, it is

Ordered, that the application made by Andrew Newcomb for the commencement of an action against the St. Ann's School of Industry and Reformatory of the Good Shepherd, be, and the same hereby is, denied.

Dated, December 13, 1916.

(Signed)

EGBURT E. WOODBURY,

Attorney-General.

By MERTON E. LEWIS,

First Deputy.

In the Matter of the Application of the New York County Lawyers' Association for the commencement of an action to vacate the charter and annul the corporate existence of L. Tannenbaum, Strauss & Co.

GENERAL CORPORATION LAW, SECTION 131; PENAL LAW, SECTION 260, L. TANNENBAUM, STRAUSS & CO., ACTION TO ANNUL; CORPORATIONS PRACTISING LAW.

A corporation which accepts employment from property owners to institute proceedings before the Board of Commissioners of Taxes and Assessments of the city of New York, and to appear for and represent such property owners before such Board in such proceedings is thereby practicing law in violation of section 280 of the Penal Law and is exercising a power and privilege not conferred upon it by law, and is engaged in a business in which a corporation may not lawfully engage.

RECOMMENDED.

That the application of the New York County Lawyers' Association for the bringing of an action pursuant to section 131 of the General Corporation Law for a judgment vacating the charter and annulling the corporate existence of L. Tannenbaum, Strauss and Company, Inc., be granted, unless it shall immediately cease to appear for and represent property owners in proceedings before the Board of Taxes and Assessments of the city of New York for the reduction or cancellation of assessments, or otherwise to practice law.

Report to the Attorney-General in the matter of the application of the New York County Lawyers' Association for the institution of an action to vacate the charter and annul the corporate existence of L. Tannenbaum, Strauss and Company, Inc.

STATEMENT

The New York County Lawyers' Association has presented to the Attorney-General its verified petition or complaint praying for the commencement of an action by the Attorney-General, pursuant to section 131 of the General Corporation Law to vacate the charter and annul the corporate existence of L. Tannenbaum, Strauss and Company, Inc., because of the alleged violation by said corporation of section 280 of the Penal Law.

Having been designated to hear the proofs and arguments of the parties I caused a hearing to be held at the New York city office of the Attorney-General, due notice thereof having been first duly given to the respondent corporation, upon which hearing the petitioner was represented by Mason Trowbridge, Esq., as attorney; George W. Whiteside, Esq., and George R. Adams, Esq., of counsel, and the respondent was represented by Gabriel I. Lewis, Esq., as attorney and counsel.

The petition herein charged substantially that the respondent corporation had been engaged in the business of accepting employment from property owners to institute proceedings before the Board of Commissioners of Taxes and Assessments of the city of New York for the reduction or cancellation of assessments for the purpose of taxation, and it had appeared for and represented such property owners in such proceedings before such Board, and

had also instituted proceedings in court for the review of the determination of such Board in such proceedings and had employed and furnished lawyers for the purpose of instituting and conducting such proceedings, and thereby it has violated section 280 of the Penal Law by practicing law and exceeded its charter powers by engaging in a business denied to corporations under the laws of this State, and has thereby subjected its charter and its corporate existence to the liability of annulment at the suit of the Attorney-General, pursuant to the provisions of section 131 of the General Corporation Law.

The respondent, by its answer, denied the legal conclusions drawn by petitioner from its allegations of fact; denied that it had at any time furnished legal service, or attorneys or counsel, in proceedings before the Commissioners of Taxes and Assessments of the City of New York; denied that it had conducted certiorari proceedings, but admitted that certain certiorari proceedings in the name and behalf of certain taxpayers had been conducted by one or more attorneys employed and paid by it, but alleged that every such employment and payment was in all respects within its lawful rights and powers; that in such employment and payment it was acting as the lawful agent for the taxpayers for whom the proceedings had been instituted, and denied generally that its conduct with respect to any of such proceedings amounted to or was practicing law.

A stipulated statement of facts was submitted upon the hearing; there was also testimony taken.

I find the following to be the material facts developed upon the hearing:

FACTS

The respondent, L. Tannenbaum, Strauss & Co., Inc., is a corporation organized and existing under the provisions of the Business Corporations Law of the State of New York, having been incorporated on or about December 20, 1912. The objects of the corporation, as stated in its certificate of incorporation, include almost every activity for which a corporation may be formed under the provisions of the Business Corporations Law, and particularly the following:

"To transact a general real estate agency, and brokerage business, buying and selling and dealing in real estate and real property and any interests and estates therein on commission and renting and managing real estate."

"To appraise all forms of real and personal property and all interests therein, and to furnish services in the reduction of taxes and assessments so far as and to the extent that the same may be done and performed by corporations organized under the Business Corporations Law of the State of New York."

For several years prior to December 31, 1912, Mr. Leon Tannenbaum and Mr. Benjamin Strauss, the president and secretary, respectively, of the respondent corporation, were engaged in the general business of buying and selling, renting, appraising and managing real estate and placing all mortgages thereon, and also as insurance brokers conducting said business as a copartnership under the firm name and style of L. Tannenbaum, Strauss & Co., Inc. .

In the year 1910, Mr. Jerome Tannenbaum, now the treasurer of respondent corporation, was admitted to the firm. Messrs. Tannenbaum and Mr. Strauss, together, constitute all of the officers and stockholders of respondent corporation.

In the fall of the year 1911 and prior to the incorporation of the respondent corporation, the partnership added to its other activities that of accepting employment by real estate owners in the city of New York, to make investigations, ascertain facts, collect data, etc., and based thereon, to make applications for such owners of real estate to the Commissioners of Taxes and Assessments of the city of New York for a review and reduction of assessments for taxation upon property of their clients; in some instances soliciting such employment from such real estate owners.

The employment was effected and evidenced by a memorandum signed in each instance by the property owner in form an authorization to the firm to take *all lawful proceedings* to obtain a reduction of the assessment, and an agreement to pay the firm, if successful, 1 per cent on the amount of any such reduction, and, if not successful, to pay nothing.

Pursuant to such employment in January, 1912, the Messrs. Tannenbaum appeared in person before the Tax Commissioners

in behalf of the owners of real estate employing said firm, submitting such data and proofs as seemed appropriate and made oral argument for a review and reduction of the assessments of their employers. Neither of the Messrs. Tannenbaum nor Mr. Strauss is an attorney at law.

Thereafter, the firm, acting in behalf of certain property owners who had so employed it, employed Mr. Putzel, attorney, to institute and conduct certiorari proceedings in behalf of such property owners to review the action of the Commissioners in fixing the amount of their assessments and such certiorari proceedings were thereafter instituted and prosecuted by Mr. Putzel whose compensation it was agreed should be 25 per cent of the compensation received by the firm, to be paid by the firm.

Thereafter and up to the middle of November, 1912, the firm solicited and obtained employment from other owners of real estate to take *lawful proceedings* to obtain a reduction of the assessed valuations of such owners' property, such employment being effected and evidenced by a written memorandum signed by the property owners in the same form as the memorandum first above referred to, and containing in addition an agreement on the part of the property owners to furnish the firm with full data and to execute and deliver papers whenever requested by the firm, and pursuant to such employment the firm made and prosecuted applications to the Tax Commissioners for the revision and reduction of the assessments of their employers. Some of the contracts made during the year 1912 were in form made in the name of Mr. L. Tannenbaum individually and by such contracts the property owners in terms retained and employed Mr. Tannenbaum as agent to take all lawful proceedings to obtain reduction of assessments for the year 1913.

When the respondent corporation was incorporated it took over the entire business of the firm as above outlined, including all outstanding contracts of the character indicated above, which had been made by the firm and in the name of Mr. L. Tannenbaum, and thereafter assumed the obligation of carrying out the terms thereof.

In January, 1913, hearings were held by and before the Commissioners of Taxes and Assessments on numerous applications

for revision and reduction of assessments which had been filed by the firm, at which hearings Messrs. Leon Tannenbaum and Jerome Tannenbaum appeared for their clients, submitted data and made arguments for reduction.

Thereafter, the attorney who had been previously employed by the firm before the organization of the corporation, as above recited, at the instance and direction of the officers of the corporation, instituted certiorari proceedings for the review of the action of the Commissioner of Taxes and Assessments with respect to the assessment against the properties of the clients of respondent corporation. At the time of the hearing in this matter about 100 of such certiorari cases were still pending undisposed of.

No express agreement was made between the corporation as such and the said attorney, the attorney proceeding under his original employment by the firm, both he and the corporation's officers tacitly assuming that the terms of the attorney's employment by the firm continued to bind and control the relations between the attorney and the corporation.

In the spring of 1913 certain of the certiorari cases instituted by the attorney in the year 1912 were settled by agreement between said attorney and counsel for the city of New York without trial, the city refunding portions of the taxes which had been paid by the property owners. The moneys so paid by the city of New York were paid directly to the owners of the properties involved which, in turn, paid to the corporation amounts equivalent to the compensation provided for by the contracts between the property owners and the firm, and thereafter the corporation paid to the attorney the fees provided for in the agreement between himself and the firm.

Thereafter the corporation secured further similar employment by property owners, caused similar applications for a revision or cancellation and review of assessments to be filed with and prosecuted before the Commissioners of Taxes and Assessments, by its officers appeared, presented proofs and made argument for its clients before said Commissioners and caused certiorari proceedings to be instituted, prosecuted and tried by the attorney who had been originally employed by the firm, and after the incorporation had continued to act for the corporation.

The corporation had continued to accept employment for property owners and to render services of the general nature above outlined, down to the present time, except for the changes in the terms of the agreements of employment hereafter noted.

In or about the month of April, 1914, the corporation began to secure employment by property owners under a form of agreement whereby the property owner authorized the corporation to take "*any lawful proceeding*" to have a fair and equitable tax assessment imposed for the year covered by the agreement and upon the property specified in it, and agreed to pay the corporation as compensation 1 per cent of any and all reductions made subsequent to the execution of the agreement, whether the reductions were obtained by oral application or argument, or both, or by written application to, or argument before, the Commissioners of Taxes and Assessments, or both, or by certiorari proceedings, or otherwise, no charge to be made for proceedings in connection with any valuation which was not reduced. The corporation, on its part, agreed "to undertake said proceedings, to use diligent efforts therein and to assume and pay all expenses and disbursements incurred by it in connection therewith."

The corporation transacted the business and rendered the agreed services pursuant to the terms of such agreement down to on or about October 1, 1914. It did not, however, institute certiorari proceedings for clients who had signed this form of agreement, but its attorney was retained by certain of such clients, in some cases directed so to do by respondent as agent for the property owners, and for them he instituted and prosecuted such certiorari proceedings, in the course of which the corporation furnished him with technical data as to real estate value for use in the proceedings.

All charges by said attorney for such professional services were understood to be made by said attorney to the property owners directly, and payment therefor to be made by the property owners directly to said attorney. Said attorney has an office in a ceedings, *not including any litigation*," and in addition to that being part of the attorney's annual retainer. The attorney also conducts a general law practice for other clients than respondent.

In the month of October, 1914, the corporation again modified its form of agreement, and under the modified form is transacting

business and rendering services of the same general nature as before, except as modified by the agreement. The modified form of agreement is in all respects substantially the same as the form of agreement last above referred to, except that in the modified form of agreement the corporation "agrees to undertake said proceedings, *not including any litigation*," and in addition to that change of provision was inserted in the new agreement as follows: "Litigation for the purpose of securing such reduction shall be optional with the undersigned and conducted by attorneys and counsel selected and paid by the undersigned. In case such litigation results in reduction of the said valuation or assessment, the aforesaid compensation to L. Tannenbaum, Strauss & Co., Inc., shall be reduced by an amount equivalent to the reasonable expense of such litigation, including the reasonable fees of the attorneys and counsel engaged therein; but, in ascertaining such reduction of compensation, the amount of any and all costs which may be awarded to the undersigned in any such litigation, shall first be deducted from the amount of such expense and agreed fees. Provided, however, that in the event that, prior to any such litigation, a reduction shall have already been procured by L. Tannenbaum, Strauss & Co., Inc., entitling them to compensation hereunder, the compensation which they would have received except for such litigation is not to be reduced by the amount of any attorneys' or counsel fees. Said L. Tannenbaum, Strauss & Co., Inc., is not, in any event, to be expected, nor is it hereby authorized, nor does it undertake to procure or supply any counsel or attorney for the undersigned, or to institute or conduct any legal proceedings in behalf of the undersigned."

In or about the month of July, 1914, the corporation published and distributed to certain real estate brokers and owners whose assessments the corporation had investigated and others with whom the corporation had done business, about 2,800 copies of a pamphlet, containing in addition to other matters, the following:

"The Tax Efficiency Service of L. Tannenbaum, Strauss & Co., Inc., New York.

Are your taxes too high, and, if so, how much?

The function of our Tax Efficiency Service is to ascertain what you ought to be paying and secure the correct readjustment.

"Presenting Your Case."

Once we establish your right to a lower assessment to our personal satisfaction, we proceed to establish it legally.

Our tax efficiency experts carry the matter before the Commissioners of Taxes and Assessments of the City of New York, arguing your case personally or by written application or argument or both.

As charges are made for these proceedings only in case they are successful, you are assured of thoroughly able and earnest representation.

All costs are covered by a 1 per cent. commission paid us on whatever reduction is obtained. We retain counsel where necessary to conduct certiorari cases, and the charge of 1 per cent. includes all fees and expenses.

Hence our Tax Efficiency Service offers you either a positive saving or positive assurance that you are not over-taxed.

Here are figures showing some representative results recently obtained for clients by our Tax Efficiency Service:

Original Assessment.	Revised Assessment.	Reduction.
\$2,460,000	\$2,270,000	\$190,000
2,225,000	1,900,000	325,000
717,000	580,000	137,000
1,271,000	758,000	513,000
12,000	8,000	4,000
140,000	117,000	23,000
98,000	60,000	38,000
210,000	157,000	53,000
185,000	120,000	65,000
1,900,000	1,820,000	80,000
1,000,000	895,000	105,000
1,280,000	335,000	945,000
1,000,000	890,000	110,000
1,125,000	775,000	350,000
975,000	790,000	185,000
520,000	300,000	220,000
165,000	125,000	40,000
57,000	43,000	14,000

"Following is the record of several recent decisions handed down by Supreme Court Justice Blanchard, awarding reductions to clients whose cases we carried to the Supreme Court:

"From New York *Evening Post*, March 26, 1914.

"Cut in Greene Street Taxes.

Supreme Court Justice Blanchard, in actions before him for relief from assessments on property in the Greene street section, ordered the following reductions yesterday: J. Mandel, \$55,000 to \$52,000; Mabel Mandel, \$83,000 to \$78,000; H. S. Mainhard, \$70,000 to \$66,000; L. Fisher, \$55,000 to \$52,000; T. Woodbury, \$42,000 to \$38,000; J. Solomon, \$40,000 to \$37,000.

"These actions were brought in the interest of the various property owners by us," said L. Tannenbaum of L. Tannenbaum, Strauss & Company, "and we have been striving for three years to secure the reductions. Heretofore, the Tax Commissioners acceded to requests made for reductions and this is the first time they compelled us to go to the courts for relief."

None of such pamphlets were, however, distributed after adoption of the last modified form of agreement, in October, 1914, under which form only have employments been accepted since October, 1914.

Since the month of June, 1914, the corporation has in no manner, either for itself or as agent for clients, or in any other capacity, requested, furnished or procured any attorney-at-law to institute or conduct legal proceedings of any kind in behalf of any client or other person or corporation, and has stipulated that it will not so do until the determination of this matter by the Attorney-General.

At no time has the corporation retained or procured or furnished attorneys-at-law to appear for clients before the Tax Board; such appearances have always been by the Messrs. Tannenbaum, who are not admitted attorneys and have not represented themselves to be such.

OPINION

There can be no question but that the business conducted by respondent prior to October, 1914, as outlined in the statement

of facts, involved the violation of section 280 of the Penal Law and was of a character which a corporation could not lawfully conduct. It instituted and conducted certiorari proceedings for clients through an attorney selected, employed, furnished, directed and paid by itself. Though the act of employment of the attorney occurred prior to respondent's incorporation, the relations continued after the incorporation, certiorari proceedings were instituted by him after the incorporation at respondent's direction and in part for respondent's benefit. This I must hold to be practising law and furnishing attorneys and counsel to render legal services on the part of the corporation in violation of section 280 of the Penal Law. Inasmuch, however, as that branch of respondent's activities has wholly ceased since October, 1914, I conclude that no public interest would be served by an action to vacate its charter based thereon.

But petitioner contends that, aside from the certiorari proceedings, respondent has offended, and is continuing to offend, by reason of its appearances and conducting of proceedings for revision and cancellation of assessments before the Board of Commissioners of Taxes and Assessments, in that by so doing it is practising law. Respondent urges in its defense that the Board of Taxes and Assessments is not a judicial body and that its acts before that board with reference to proceedings for revisions and cancellations do not constitute practising law or practising or appearing as an attorney-at-law, within the meaning of section 2-a of the Business Corporations Law and section 280 of the Penal Law.

A study of the sections of the Greater New York Charter regulating the making and revision of assessments for taxation, sections 889-898, inclusive, discloses that the assessments in the first instance are made by and represent the judgment of the deputy tax commissioners, and that if the legality or justice of any assessment be challenged, complaints with reference thereto are determined by the Board of Taxes and Assessments, after a hearing with or without sworn testimony according to the nature of the complaint, which testimony is taken either by the Board or by a deputy tax commissioner duly designated for that purpose, and must be reduced to writing and filed in the main office of the

board, thereby becoming part of the record of the proceedings with respect to the assessment. In making final disposition of such complaints and revising or cancelling, or refusing to revise or cancel an assessment, the Board of Taxes and Assessments is not sitting in review of determinations which the members of the board have personally made, but of determinations and conclusions made and reached by the deputy tax commissioners. This function of the Board of Taxes and Assessments I have concluded to be judicial in its nature, giving to the board, while exercising it, the character of a judicial body within the meaning of section 280 of the Penal Law, which declares it to be unlawful for a corporation to practice or appear as an attorney-at-law for any person other than itself in any court in this State or before any judicial body.

In the early case of *Chegary v. Jenkins* (1851), 5 N. Y. 376, it was held that assessors in determining whether the plaintiff's property was taxable as a dwelling or exempt as a seminary of learning, acted judicially and that the rule that ministerial officers who execute the process of courts are protected if the process shows upon its face that the court had jurisdiction to issue it, applies to an officer acting pursuant to an assessment made by the assessors.

In stating the unanimous opinion of the court, Ruggles, Chief Justice, referring to the case of *Savacool v. Boughton*, 5 Wend. 170, says:

“ It was there settled that a ministerial officer is protected in the execution of process whether the same issue from a *court* of general or limited jurisdiction although such *court* have not in fact jurisdiction in the case, provided it appears on the face of the process that the *court* has jurisdiction of the subject-matter and the process in other respects shows no want of authority. The principle established in the case here cited is applicable to the case before the court. The assessors in determining whether the plaintiff's property was taxable as a dwelling, or exempt as a seminary of learning, *acted judicially* and within the sphere of their duty.”

In *Barhyte v. Shepherd*, 35 N. Y. 238 (1866), the Court of Appeals cited with approval the *Cregary* case (*supra*), and after

a quite exhaustive examination and review of the authorities again declared the judicial character of the work of assessors in making assessments and enumerated and discussed some of the purely legal questions which assessors are frequently called upon to decide. The Court, among other things, says:

“ An examination of the nine several subdivisions of section 4 of title 1, chapter 13 (the then Tax Law), will satisfy anyone having some acquaintance with the decisions of the courts, and the difference of opinion often prevailing among judges and lawyers in respect to the questions necessarily arising under these provisions, that the performance of the duties of an assessor in considering the subject of exemption from taxation, will be one of considerable embarrassment. It is made their duty by section 8, referred to above, to ascertain by diligent inquiry who are the taxable inhabitants and the real and personal property which is taxable within their respective towns or wards. It devolves upon them to determine who are residents; what real and personal property is exempt by the constitution of the state or of the United States; what buildings are exempt as colleges, academies, seminaries of learning or public worship; who is a minister or priest and under what circumstances he may claim an exemption, and how much of his real and personal property is subject to taxation. The question of residence is often one of very great difficulty. It will be found by a reference to the law reports of this state that the judges of this court and of the New York superior court were not in accord in holding a building exempt as a seminary of learning or taxable as a dwelling. * * * It will be found that all the reported cases recognize that assessors do act judicially in deciding or determining certain questions which come before them in the performance of their duties and that when they do so act they are not liable in an action for errors or mistakes in their decisions. The cases are not uniform in respect to the occasions when these officers do act judicially and when ministerially.”

In *Swift v. City of Poughkeepsie* (1868), 37 N. Y. 511, the Court said:

"The other question also, to wit: that the assessors in making their determination acted judicially and are entitled to the protection which is accorded to *all tribunals* and parties thus acting can no longer be regarded as an open question in this court. This point, so far as the assessors are concerned, seems to have been put at rest in *Barhyte v. Shepherd*, 35 N. Y. 238."

In *Ireland v. City of Rochester* (1868), 51 Barb. 414, the Court, speaking of the imposition of assessments (assessments for local improvement made by the common council) says:

"It is in the nature of a *judicial proceeding* against them and its effect is to take their property for public use. * * * It is a plain principle of justice applicable to all *judicial proceedings* that no person should be condemned or shall suffer judgment against him without an opportunity to be heard."

In *Buffalo and State Line Railroad Company v. Supervisors of Erie County*, 48 N. Y. 93 (1871), the Court refers to its decisions in the Swift and Barhyte cases (*supra*), and holds that assessors in making assessments in all cases where they have jurisdiction act judicially, the Court deciding:

"The assessors are quasi-judicial officers and the assessment roll when finally completed by the supervisors of the county stands as a *judgment*."

In referring to the case of *Whitney v. Thomas*, 23 N. Y. 281, where collateral attack upon an assessment was permitted, the Court said:

"The assessment was also held to be void in that case for another reason affecting the jurisdiction of the assessors. The lands were not assessed according to the fact either as the lands of a resident owner or of a non-resident. They were assessed to a third person, who had no ownership and possession and no connection with them. It was not a mere error of the assessors but a disregard of the facts of the case. They entered a *false judgment*, not warranted by any facts proven.

It could not be called a mistake of law or fact, such as the assessors, acting as quasi-judicial officers, might honestly make. * * * Jurisdiction is a subject which relates to the *power of the court*, and not to the right of the parties as between each other. If the law confers the power to *render a judgment*, then the *court has jurisdiction*; what shall be adjudged between the parties and with which is the right, is judicial action by hearing and determining it. When a *court* has jurisdiction, it has a right to decide every question which occurs in a cause; and whether its decision be correct or otherwise, its *judgment* is binding in every *other court*, but if it acts without authority its judgments are nullities."

Judge Earl, in a concurring opinion, says:

"It is now settled that assessors in making assessments in all cases where they have jurisdiction act judicially. This land was situated in the town of Hamburgh, and, hence, the assessors of the town had jurisdiction to assess it. In exercising this jurisdiction they were to decide not only all questions of fact involved but also all questions of law. Among other things, they were to determine whether this land was to be assessed as resident or non-resident land, and that was a question of both law and fact * * *. In such a case it cannot be that the assessors are to determine at their peril. On the contrary, I have no doubt that whichever way they decide they have the immunity of judicial officers; and as they will be protected all persons who act upon their assessment in enforcing the tax will have equal protection; and the tax after it has once reached the treasurer of the county can no more be collected back than if it had been placed there as the proceeds of a judgment of a regular court."

In *Matter of Ford* (1872), 6 Lans. 92, the Court uses this language:

"The duties of assessors in making assessments are of a 'judicial nature' and it is a fundamental rule that in all judicial or quasi-judicial proceedings whereby the citizen may be deprived of his property he shall have notice and an

opportunity of a hearing before the proceedings can become effectual."

In *Williams v. Weaver* (1878), 75 N. Y. 33, the court in the opinion, says:

"But for an erroneous assessment, the assessors, while acting in that capacity are not individually liable, and therefore there is no remedy by action against them for the grievance complained of by the plaintiff. That class of public officials is charged with duties which require the exercise of *judicial functions*, and when they are called upon thus to act they are protected from the consequences which may flow from any error they may commit."

In *Mayor, etc., of New York v. Davenport* (1883), 92 N. Y. 604, Judge Finch, writing the unanimous opinion, uses this language:

"The assessors of the several towns first make out their rolls and determine the valuations. In this respect they *act judicially* and any erroneous decision can only be corrected by a direct review of their proceeding, whenever they have kept within their jurisdiction. If they have so acted, their conclusions cannot be assailed either by a suit at law against them, or against those who take the further steps toward collection based upon their action."

The court cites in support of that proposition *Barhyte v. Shepherd*, *Swift v. Poughkeepsie*, *Buffalo and S. Line R. R. Co. v. Supervisors of Erie* (*supra*).

In *Matter of Ferris* (1887), 10 N. Y. St. Rep. 480 (Superior Court of Buffalo), the court uses this language:

"In levying this assessment the assessors acted in a *judicial capacity*, and their determination is a judgment. * * * It has already been seen that acting upon their opinion produces a judgment."

In *Stanley v. Supervisors of Albany* (1887), 121 U. S. 533-550, the court said:

"In nearly all the states, probably in all of them, provision is made by law for the correction of errors and irregularities of assessors in the assessment of property for the purpose of taxation. This is generally through boards of revision or equalization as they are often termed, with sometimes a right of appeal from their decision to the courts of law * * *. To these *boards of revision* by whatever name they may be called, the citizen must apply for relief against excessive and irregular taxation where assessors had jurisdiction to assess the property. *Their action is judicial in its character.* They pass judgment on the value of the property upon personal examination and evidence respecting it. *Their action being judicial, their judgments in cases within their jurisdiction are not open to collateral attack.*"

In Matter of Corwin (1892), 135 N. Y. 245, Maynard, J., speaks of an assessment as a judgment thus:

"The taxpayer could not anticipate the action of the assessors, and service of the writ upon them before they had entered the judgment sought to be reviewed would be premature."

In United States Trust Co. v. Mayor, etc., of N. Y. (1893), 144 N. Y. 488, 492, plaintiff sought, by action to recover back taxes paid by it, upon property which it claimed to be exempt by law from taxation. The claim had been presented to the tax commissioners, who reduced but refused to cancel the assessments. No review by certiorari was had. The court, referring to the failure of plaintiff to obtain a review by certiorari, said:

"This was the remedy which the statute prescribed for the review of assessments illegal, erroneous or unequal and through which a reversal might be had, and it is the appropriate proceeding at law to correct the errors of the taxing officers. They were *acting judicially* in assessing the plaintiff and their action *had all the force and effect of a judgment*, which, while open to review by some direct proceeding prescribed by law, is secure against collateral attack."

In Brooklyn Elev. R. R. Co. v. City of Brooklyn (Kings County Special Term, 1896), 16 Misc. 416, the court, at page 417, says:

"Assessors act under the law upon a notice of hearing to all persons interested, and after hearing all who come before them. Their attestation of the assessment rolls in the form and words prescribed by law is a *judicial act* of unquestionable verity. * * * If they were allowed to impeach it by their testimony, no tax levy, however exactly and legally cast, would be safe."

In City of New York v. McLean (1902), 170 N. Y. 383, the court said:

"The board of taxes and assessments, in making the assessment which is sought to be enforced by this action, acted *judicially*. Hence, the important question presented is whether it had such *jurisdiction* of the person of the defendant as authorized it to make a personal assessment against him. That it had *jurisdiction* to assess the shares of stock belonging to him and which stood in his name is not denied. Did it not have such *jurisdiction* of his person as authorized it to make an assessment which could be enforced against him personally? We think not. No sovereignty can subject either property not within its territorial limits or the person of one not within its boundaries to its *judicial decisions*."

In Mercantile National Bank v. Mayor of New York (1902), 172 N. Y. 41, the court uses this language:

"Thus the common law writ of certiorari, in bringing up for review the *proceedings* of the commissioners of taxes and assessments, which are, unquestionably, *judicial* in their nature, would present questions of jurisdiction," etc.

In City of New York v. Vanderveer (1904), 91 App. Div. 303, the court says:

"In levying the assessment the assessors *act judicially* and their action has all the force and effect of a judgment. A judgment regular upon its face imports absolute verity and in action thereon the record forms the basis for it and it is

neither to be increased nor diminished in the obligation created thereby. *Such judgment* is not open to attack, nor can it be questioned collaterally."

Counsel for respondent has cited cases from several foreign jurisdictions in which are found dicta seeming to lend support to his contention that the board of commissioners of taxes and assessments is not a judicial body, but, as we are engaged in the work of construing a statute of New York State and as the courts of New York have decided over and over again that the acts of such boards are judicial in their nature, that proceedings before them are in the nature of judicial proceedings, and that their determinations have the attributes and effect of judgments, I have refrained from discussing such foreign citations. Respondent has referred also to several New York cases, none of which decides, however, that boards of assessors or boards of tax commissioners are not, while reviewing assessments upon application for revision or cancellation, judicial bodies.

While in *McMahon v. Palmer*, 102 N. Y., the court says:

"The proceedings by which taxes for governmental purposes have been assessed, levied and collected from the citizen have always been regarded as administrative and not judicial in their character."

that was not the question before the court for its decision and the statement is at variance with the long line of decisions above considered, and in the same opinion the court speaks of "the exercise of the *judicial powers* conferred upon the assessors in making the assessment in question," and holds that such assessment may not be collaterally attacked.

The *Zborowski* and *DePeyster* cases (68 N. Y. 88, and 32 App. Div. 6) did not consider or decide as to the nature or character of the acts or determinations of assessors or other officers performing similar functions. The boards whose acts were before the court in those cases were given by law no power nor charged with any duty to hold hearings, take testimony or make adjudications.

Matter of Hempstead, 32 App. Div. 6, decides that a summary investigation of the financial affairs of a town by and before a judge pursuant to the provisions of the General Municipal Law is

a judicial proceeding and a special proceeding within the meaning of sections 3333 and 3334 of the Code of Civil Procedure, and that therefore an appeal from the order made therein lies to the Appellate Division. Though Cullen, J., in the opinion, says that the action of assessors and other tax officers in the levying or imposition of a tax is the action of "an administrative or executive branch of the government," and therefore not proceedings in court, he also says their actions are judicial in the broad sense of that term.

In *People ex rel. Kendall v. Feitner*, 51 App. Div. 196, and *People ex rel. Thompson v. Feitner*, 168 N. Y. 441, cited by respondent such expressions as "mere administrative tribunals" and "mere taxing officers" were used in speaking generally of the Board of Commissioners of Taxes and Assessments. The expressions were, however, *obiter* for the reason that the nature or character of that board or its functions was not before the court, which was considering the power and duty of the court in certiorari proceedings.

Smith v. The State of New York, 214 N. Y. 140, does not decide that the Board of Claims is not a judicial body, but that it is not a court in the strict sense of that term. To the same effect is *People ex rel. Swift v. Luce*, 204 N. Y. 478. *Armstrong v. Murphy*, 65 App. Div. 126, involved the action of a police commissioner in granting or withholding a theatrical license which was held to be administrative and not judicial. Thus it will be seen that none of the cases cited by respondent from our own courts hold contrary to the conclusion which I have reached that the Board of Commissioners of Taxes and Assessments when hearing and determining applications for revision and cancellation of assessments is a judicial body at least within the meaning of section 280 of the Penal Law. The words "any judicial body" used in that section must be given some meaning if that result is reasonably possible. If the prohibitions of the section refer only to proceedings in a court or before a judge bearing those statutory titles, the term "any judicial body" is a mere redundancy and adds nothing to the meaning of the section. There should be no straining to reach such a conclusion in order to find justification for corporations to engage in the business of representing clients in legal proceedings.

It is also my opinion that a corporation which makes it its business, for pay, to prepare and present to the Board of Taxes and Assessments, or to designated deputy commissioners, applications for persons or other corporations to bring about revision or cancellation of assessments and to take charge of the proceedings with reference to the hearing and determination of such applications, and to advocate before such board or deputy commissioners such revision or cancellation, is, while so doing, practising law and practising and appearing as an attorney-at-law before a judicial body, as those expressions are commonly understood, and within the meaning of section 280 of the Penal Law and section 2-a of the Business Corporations Law.

Section 280 of the Penal Law makes it unlawful for any corporation

1. To practice or appear as an attorney-at-law for any person other than itself in any court in this State or before *any judicial body*.
2. To make it a business to practice as an attorney-at-law for any person other than itself in any of the said courts.
3. To hold itself out to the public as being entitled to practice law or *render or furnish legal services or advice*.
4. To furnish attorneys or *counsel to render legal service of any kind* in actions or proceedings of any nature or in *any other way or manner*.
5. *In any other manner to assume to be entitled to practice law* or to assume, use or advertise the title of lawyer or attorney, attorney-at-law or equivalent terms in any language in such manner as to convey the impression that it is entitled to practice law, or to furnish legal advice, services or counsel.
6. *To advertise that either alone or together, with or by or through any person, whether a duly and regularly admitted attorney-at-law, or not, it has owns, conducts, or maintains a law office or an office for the practice of law, or for furnishing legal advice, services or counsel.*

7. To solicit itself, or by or through its officers, agents or employés any claim or demand for the purpose of bringing an action thereon or of presenting as attorney-at-law, or for furnishing legal advice, services or counsel to a person sued or about to be sued in any action or proceeding or against whom an action or proceeding has been or is about to be brought, or who may be affected by any action or proceeding which has been or may be instituted in any court or before any judicial body, or for the purpose of so representing any person in the pursuit of any legal remedy.

Section 2-a of the Business Corporations Law provides as follows:

“No corporation shall be organized or created under the provisions of this chapter for the purpose or purposes of conducting *any branch of the practice of law*, or of retaining or employing an attorney or attorneys to furnish legal advice, *draw legal papers or perform legal services of any kind* or description, either directly for the person, persons or corporation for whose use such services are rendered, or for the corporation retaining such attorney in compliance with any contract of employment of the corporation or of the attorney made by the corporation with any other person, persons or corporation. The statement of the purpose or purposes of a corporation, in any certificate filed under the provisions of this chapter, in whatsoever language the same may be set forth, shall not be held or construed to confer on the corporation the power to transact any business specified in this section as a purpose for which the creation of a corporation under this chapter is prohibited; and particularly when the stated objects of a corporation include the collection of debts or accounts, in words or substance, they shall not be construed to include the employment or furnishing of attorneys to prosecute any action or pursue any legal or equitable remedy in aid of such collections.”

In order to find that respondent has engaged in a business unlawful to it, it is not necessary to find that it has violated section

280 of the Penal Law above referred to, though of course if it has violated the Penal Law in the respect complained of, it has been engaged in a business unlawful to it and has made itself liable to action for annulment of its charter:

In Matter of Co-operative Law Co., 198 N. Y. 479, the Court of Appeals has held that it was unlawful for a corporation to engage in the practice of law before the enactment of the statutes above referred to.

What then is the meaning of the term "practice law," and what acts constitute practising law, practising and appearing as attorney-at-law? Counsel for respondent in his brief says:

"No court so far as respondent is aware has defined the practice of law in terms sufficiently explicit or general to cover all cases in which the phrase requires interpretation."

It is true there have not been many judicial attempts at such definition, but those which I have been able to find seem to support the contention that the services rendered by respondent before the tax board constituted practising law.

In Eley v. Miller, 34 N. E. 836 (Indiana Appellate Court, 1893), it was said:

"As the term is generally understood the practice of the law is the doing or performing services in a court of justice in any matter depending therein, throughout its various stages and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, the preparation of legal instruments and contracts by which legal rights are secured, *although such matter may or may not be depending in a court.*"

In re Duncan, 24 L. R. A. (New Series) 750 (South Carolina Sup. Ct., 1909), the court said:

"It is too obvious for discussion that the practice of law is not limited to the conduct of cases in court. According to the generally understood definition of the practice of law in this country, it embraces the preparation of pleadings and other papers incident to actions and proceedings on behalf of clients before judges and courts and in addition conveyancing, the preparation of legal instruments of all kinds, and,

in general, *all advice to clients and all action taken for them in matters connected with the law*. An attorney-at-law is one who engages in any of these branches of the practice of law. The following is the concise definition given by the Supreme Court of the United States: ‘ Persons *acting professionally in legal formalities, negotiations by the warrant or authority of their clients may be regarded as attorney-at-law within the meaning of that designation as employed in this country.* ’ ”

(The United States Supreme Court case above referred to is Savings Bank v. Ward, *infra*.)

In this case it was held that a disbarred attorney was guilty of contempt in accepting a fee for his services in attempting to induce a committing magistrate to release on payment of a fine, one committed for failure to pay such fine, under a sentence imposing a fine or imprisonment “ *although all that he contracted to do might have been done by one not admitted to the bar.* ” .

In Savings Bank v. Ward, 10 U. S. 195, this language is used:

“ Persons acting professionally in legal formalities, negotiations or proceedings by the warrant or authority of their clients may be regarded as attorneys-at-law within the meaning of that designation as used in this country; and all such when they undertake to conduct legal controversies or transactions profess themselves to be reasonably well acquainted with the law and the rules and practice of the courts and they are bound to exercise in such proceedings a reasonable degree of care, prudence, diligence and skill.”

It seems quite clear to me that the business conducted by respondent comes within the definitions of practising law as stated in the cases above referred to and also that it is within the prohibition of section 280 of the Penal Law and section 2-a of the Business Corporations Law.

If an assessment is illegal or too high, the person against whom or whose property such assessment has been made, has a legal right to have such assessment cancelled or reduced if he makes seasonable application therefor, pursues the procedure provided by law and presents satisfactory and convincing legal argument or proof, or both, of the virtue of his claim. His right to cancellation or reduction is declared by law. The board before which he must

urge his claim is created and its powers and duties in the premises are declared by statute, and the board proceeds under rules and regulations which have the force of law. (Charter, § 898.)

When he proceeds before the tax board to have his assessment canceled or reduced, he is undertaking a legal proceeding to obtain a legal remedy and to establish a legal right. If the application is with respect to an assessment of real estate, the application must be in writing, stating the ground of objection thereto. (Charter, § 895.) If the application is with respect to an assessment of personal estate, the applicant must, and in any case, he and other witnesses may be examined on oath, and such testimony, when taken, must be reduced to writing and "*shall constitute part of the record of the proceedings upon such assessment.*" (Charter, § 898.) In order that the applicant or he who acts for him in instituting the proceeding, may seasonably present and properly prosecute his application, it is necessary to know when and where the statute has provided it must be presented and the rules and regulations governing the proceedings. The application must be properly drawn and contain allegations of law or fact, or both, sufficient to raise a lawful issue, or the applicant's case cannot be heard either before the board or later by writ of certiorari.

People ex rel. Sutphin v. Feitner, 45 App. Div. 542.

People ex rel Zollykoffer v. Feitner, 34 Misc. 299.

People ex rel. Greenwood v. Feitner, 77 App. Div. 428.

People ex rel. Boohm v. Wells, 92 N. Y. Supp. 769.

Knowledge of the law is, therefore, necessary for the proper preparation and prosecution of the application, and this is especially so if the complaint made is that the assessment is illegal. While objections on the ground of illegality need not be first presented to the tax board, in order that they may be heard by the court on review by certiorari, yet if objections are presented to the board on any grounds, the question of the legality of the assessment will not be heard on certiorari unless that objection was also presented to the tax board.

Matter of McLean, 138 N. Y. 158.

People ex rel. Greenwood v. Feitner, 77 App. Div. 428.

If the assessment attacked is for personal property, the purely legal question, whether the character of personal property owned by applicant is assessable by the board is frequently the only question at issue. If the taking of testimony is necessary in support of applicant's objections, some knowledge of the rules of evidence is at least desirable for the proper support of such objections. The questions which may be raised and litigated before the tax board are the same questions which may later be raised and litigated before the court in certiorari, and they are heard and disposed of in precisely the same way and upon precisely the same considerations of law and fact in both tribunals. It cannot be successfully contended that one who undertakes for hire to conduct the certiorari case of another in court is not practising law. It would seem that the forum in which the work is performed cannot change the essential nature and character of the work itself. This work is such as attorneys-at-law commonly engage in, and in which laymen do not commonly engage. It involves the giving of legal advice and counsel, the preparation of papers incident to proceedings on behalf of clients, and action taken for them in matters connected with the law, which the Eley and Duncan cases (*supra*) have held to constitute practicing law. A corporation which does such work is acting professionally in legal formalities, which the Supreme Court of the United States has said in *Savings Bank v. Ward* (*supra*) is the work of attorneys-at-law, and is practising and appearing as, that is, in like manner as, and doing work of the character usually done by an attorney-at-law before a judicial body, and holding itself out to the public as being entitled to render and furnish legal services and advice and furnishing counsel to render legal services of one kind in proceedings of that nature within the meaning and prohibition of section 280 of the Penal Law, and is practising law within the meaning of that term as used in section 2-a of the Business Corporations Law.

In my judgment it is not important that the service is not rendered in a court before a judge. Much of the lawyer's work is done with respect to matters which are never the subject of appearance in court or of court record or procedure.

Services of the nature which respondent has been rendering for clients before the tax board may not lawfully be rendered by a

disbarred attorney. Section 88 of the Judiciary Law provides that a judgment or order suspending or disbarring an attorney must forbid the person suspended or disbarred from appearing as an attorney or counsellor-at-law, for compensation or reward "before any court, judge, justice, board, commission or other public authority," thus indicating that in the legislative mind such appearance before a board, commission or other public authority is practising law.

To conclude, as I have, does not make it necessary to hold that an individual, not an attorney, may not render the same character of services before the tax board of the city of New York, or before boards of assessors outside of said city, or appear for others before courts not of record outside of cities of the first and second classes. There is no provision of statute declaring a general prohibition against a person not an attorney practising law, similar to the provision of section 2-a of the Business Corporations Law, applicable to corporations. While the Judiciary Law, section 88, provides that, certain conditions having been complied with, the Appellate Division shall enter an order licensing and admitting the person so complying "*to practice as an attorney and counsellor in all courts of the state,*" and the same law in Article XV provides for the examination and licensing of persons applying for admission to practice as attorneys and counsellors "*in the courts of record of the state,*" the only statutory prohibitions or restrictions against a person not an attorney practising law are found in sections 270 and 271 of the Penal Law. Section 271 applies only to cities of the first and second classes and forbids a person not regularly admitted to practice as an attorney in the courts of record of this state, to "ask or receive, directly or indirectly, compensation for appearing as attorney *in a court or before any magistrate* in any city of the first or second class, or to make it a business to practice as an attorney *in a court or before a magistrate* in any city of the first or second class."

Section 270 declares it to be unlawful for any person, without having first been duly and regularly licensed and admitted to practise law in the courts of record of this State,

1. To practice or appear as an attorney-at-law or as attorney and counsellor-at-law for another *in a court of record* in this State, or in any court in the county of New York or in the county of Kings.
2. To make it a business to practice as an attorney or as an attorney and counsellor-at-law for another *in any of said courts*.
3. To hold himself out to the public as being entitled to practice law as aforesaid, or in any other manner.
4. To assume to be an attorney or counsellor-at-law.
5. To assume, use, or advertise the title of lawyer, or attorney and counsellor-at-law, or attorney-at-law, or counsellor-at-law, or attorney or counsellor, or attorney and counsellor, or equivalent terms in any language, in such manner as to convey the impression that he is a legal practitioner of law.
6. In any manner to advertise that he, either alone or together with any other persons or person, has, owns, conducts or maintains a law office or law and collection office, or office of any kind for the practice of law.

There is found here no forbidding of the individual to practice or appear for another "in any court in this State *or before any judicial body*," such as is found in section 280 relative to corporations. The declaration here is against practising in a *court of record* in this State or in any court of the county of New York or in the county of Kings. Section 280 was enacted long after section 270 and seems to have been patterned upon it in the main, but to have forbidden to corporations certain privileges not in terms at least denied by section 270 to individuals, viz.: that of practising and appearing as an attorney-at-law before courts not of record outside of cities of the first and second classes, and before any judicial body, rendering and furnishing legal services or advice, furnishing attorneys or counsel to render legal services of any kind in actions or proceedings of any nature or in any other way or manner.

I conclude that in prosecuting and conducting proceedings for clients, for pay, before the tax board for the cancellation or revision of assessments, respondent has violated section 280 of the Penal Law, has been doing a character of business denied to corporations organized under the Business Corporations Law, by the provisions of section 2-a of that statute, contrary to the public policy of the State regardless of statute, and that it should no longer be permitted to engage in such business.

This conclusion is not out of harmony with any of the authorities cited by respondent.

Bird v. Breedlove, 24 Ga. 623, was an action on a note given in payment for services rendered the maker by the payee in assisting to procure a pardon from the Georgia Legislature. Among other defenses it was urged that the payee, not being an attorney, could not collect pay for such services. The plea was held insufficient, the court saying, "What law is there that restricts business of this sort to attorneys-at-law? We know of none." In that case the provisions of no statute were invoked in support of the plea, nor were the services rendered by a corporation.

In *Valdes v. Larrinaga*, 233 U. S. 705, the question whether the services rendered constituted practising law or whether the person rendering them was an admitted and licensed attorney was not raised. The services were rendered in aid of an effort to obtain a concession or franchise from the military governor of Porto Rico, the secretary of war and the executive council of Porto Rico. The question before the court was one of public policy, it being charged that the services were in the nature of lobbying.

In *Dunlap v. Lebus*, 112 Ky. 237, it appeared that proceedings had been commenced against Lebus by the auditor's agent to recover a large amount of back taxes alleged to be due the State of Kentucky. Lebus claimed that the greater part of the claim against him was illegal and unjust, but he wished to avoid publicity and litigation and to settle the matter by compromise. He employed Dunlap, not an attorney, to assist him in bringing about such compromise. The services rendered by Dunlap were rendered in and about negotiations purely, and he finally effected a settlement. At his own expense he obtained legal advice from an attorney. The action was to recover the lump sum which Lebus

had agreed to pay if Dunlap effected the settlement. One defense was that Dunlap, not being an attorney, could not recover pay for the services. The Kentucky statute provided:

“No person shall practice as an attorney-at-law *in any court* until he has obtained a license to do so.”

The court said:

“The services required to be rendered under appellant's alleged employment were not necessarily such as could only be rendered by a licensed attorney, but were such as might have been rendered as well by a good business man who was also an expert accountant.”

It is also to be noted that in this case the right of a corporation to practice law was not before the court.

The People ex rel. N. Y. Hotel, etc., Co. v. Barker, 140 N. Y. 437, is in no sense an authority for the proposition for which it is cited by respondent, nor has respondent correctly quoted from it. That case simply holds that if the owner of property residing in the city of New York places his *entire* business in the hands of an agent who has full knowledge in respect thereto such agent may appear for (in place of) the owner and make the requisite proof (as a witness) upon an application for the correction of an assessment, and that if that agent was prevented by absence from the State or illness during the proper time from making the application for correction, it might be made afterward pursuant to the provisions of section 822 of the charter of the city of New York as it was at the time that case arose. This case involved the right of an agent to appear as principal and witness, not as attorney or advocate.

In Getzler v. Remington Typewriter Co., N. Y. Special Term (53 N. Y. Journal, 1351, July 3, 1915), plaintiff had sued for services rendered in auditing freight bills and preparing a claim for overcharges against the West Shore Railroad Company for presentation to the Interstate Commerce Commission, and for prosecution of the said claim before said commission. Defendant demurred and claimed that the services performed by plaintiff were those of an attorney-at-law, and as he did not claim to be an attorney he could not recover for his services as such. The

court says of the proceeding in which plaintiff's services were rendered:

"Though the proceeding was not strictly an action in court, it was brought for the purpose of enforcing the defendant's rights by appeal to a quasi-judicial body, invested by law with special jurisdiction to determine such controversies, and the same rules and principles are applicable to the relations of these parties as obtain in the relations of attorney and client with respect to the prosecution of an action in court."

Of defendant's contention that plaintiff could not recover the court said:

"While there may be merit in defendant's contention that the services alleged in the complaint are those of an attorney-at-law, the question is not free from doubt since the knowledge required to perform them is not strictly legal knowledge, but rather a technical knowledge of rates and schedules. It is not necessary to determine that question upon this motion, however (motion for judgment on pleadings) for the reason that if the contract was illegal because the plaintiff was not a duly licensed attorney, that fact is not apparent on the face of the complaint and cannot be availed of on demurrer."

This case is as much in support of the conclusion which I have reached as of respondent's contention, and at all events no corporation rights or privileges were involved.

The People ex rel. Oppenheimer v. Purdy, N. Y. Special Term, April 6, 1916, not reported, and People ex rel. Rockland-Erie Realty Co. v. Purdy, N. Y. Special Term, April 29, 1916 (55 N. Y. L. J. 406), were both motions for dismissal of writs of certiorari to review assessments. Both motions were heard and decided by Mr. Justice Philbin, both motions being upon the ground, among others, that relator's objections to the assessment had been presented to the tax board by a corporation, Manhattan Realty Appraisers, which, by so doing, was practising law in violation of section 280 of the Penal Law, and that therefore no proper application for a revision of the assessment had been made to the tax board.

In denying the motion to dismiss the writ in the Oppenheimer case, the learned justice said from the bench:

"So far as an application to the commissioners for the correction of an alleged wrongful assessment is concerned, the law contemplates that a citizen shall first give notice to the tax commissioners of the error that he claims they have committed, and give them an opportunity to remedy it. It is very much the same thing as the notice required under section 261 of the charter where a person preliminary to an action against the city is obliged to serve notice upon the city of his claim, under the law of 1886, where he is required to serve notice of intention to sue upon the corporation counsel. The statutes applicable to the question here raised contemplate that a citizen shall have an opportunity to present his grievance to the tax commissioners and that the tax commissioners shall have an opportunity to remedy it, and that the citizen is not required to go into court and ask for a writ of certiorari, institute legal proceedings in short, without giving the tax commissioners the opportunity of rectifying the error which he claims they have committed. It is not necessary that the application should be presented by a lawyer to the tax commissioners because ordinarily there is no question of law involved. All that is necessary for the citizen to do is to set forth the facts which tend to show that he has been wrongfully assessed, and to demand a hearing. It is not necessary that he should prepare a brief or submit the decisions of the court. All he has to do is to state his claim and it is not necessary for that purpose that he should be represented by an attorney. Upon the application coming on to be heard, for example, the person who presents the petition may not appear. Some one else may appear. It would not be necessary to obtain an order of substitution as you would in a regular legal proceeding in order to enable the newcomer to represent the petitioner on the application in the first instance. It does seem to me, without going any further into the illustrations of the respective conditions that might exist, that this is a case where section 280 of the Penal Law or section 2-a of the Business Corporations Law, or the cases to

which you (corporation counsel) have referred, are applicable. Therefore, a person who is not a lawyer, or even a corporation, may present a petition in the first instance to the tax commissioners, although it is true that whatever certiorari proceedings can be instituted it is necessary that such a step should be taken, still I do not think that preliminary step comes under the same requirements, so far as an attorney being employed, as a certiorari case. I do not think that you (corporation counsel) are justified in asking the court to apply the penalty as prescribed by the statutes to which you refer in the case here so far as the applications to the tax commissioners are concerned. I cannot see how that can be considered a violation, that this real estate company, assuming that to be so, appeared through an agent and made application to the tax commissioners can be considered a violation of section 280 of the Penal Law and section 2-a of the Business Corporations Law, in that it was practicing law. It is not necessary for one to be a lawyer in order to appear in such proceedings, nor is it necessary for one to have the knowledge or skill of a lawyer in order to appear in such proceedings, as would be the fact, in the preparations of claims for debts and other things to which you have referred and which are preliminary to the institution of a legal proceeding."

This opinion, expressed orally from the bench, is at best *obiter* and was not necessary to support the decision of the learned justice denying the motion to vacate the writ, for if he had held that the act of the Manhattan Realty Appraisers in preparing and presenting to the tax board the taxpayers' application for a revision of assessments was a violation of section 280 of the Penal Law and of section 2-a of the Business Corporations Law, yet if the application which it presented to the tax board was in proper form and was seasonably presented, the unlawful act of the Manhattan Realty Appraisers in preparing and presenting it could not defeat the relator's right to have the assessment reviewed. As the learned justice said in the Rockland-Erie Realty Company case (*supra*):

"It is not pertinent, however, for the court in this proceeding to pass upon the claim of respondents (the tax board)

that the said corporation was violating section 280 of the Business Corporations Law. That cannot properly be made the subject of inquiry here, for even a finding that there had been such a violation would not defeat the relator's claim. * * * The only questions now involved are as to whether the relator substantially took the steps prescribed by the statute before making application to the court for relief, and whether the attorney of record had authority to represent the relator."

The motion to dismiss the writ in the Rockland-Erie Company case was granted by the learned justice because the application to the tax commissioners for a reduction of assessment was not in proper legal form, was not properly verified and was lacking in other important details, and presented no proper proof of overvaluation or inequality, and therefore there had not been a sufficient compliance with the law requiring an application by the person aggrieved for correction being first made to the tax commissioners.

The bungling way in which that proceeding was handled by the corporation which instituted and conducted it and the disposition made of it by the learned justice, argue most strongly, to my mind, against the dictum of the learned justice, delivered in the Oppenheimer case, to the effect that the work of appearing and representing clients before the tax board is not necessarily that of a lawyer, but is work which may be as well performed by a layman or even a corporation.

In his opinion in the Rockland-Erie Realty Company case the learned justice furnished strong reason why, as a matter of public safety, corporations should not be permitted to perform such service, saying:

"While the omission to comply with the statute, in my opinion, furnishes adequate grounds for the granting of the motion and the dismissal of the writ, it is proper to also express disapproval of a corporation undertaking to assume the duty sought to be performed by the Manhattan Realty Appraisers. All of the circumstances and significance to be attached to its name justify the inference that the corporation is engaged in the business of inviting taxpayers to contest the

taxes charged against their respective properties, even to resorting to litigation for that purpose. Such aims are undesirable as opposed to public policy. * * * The fact, however, that the claim of the relator was instigated by such corporation, and made under its auspices, may be duly considered by the court in passing upon the application to it and the merits of the alleged grievance."

If the instigation and improper conduct referred to by the learned justice had been the improper and unprofessional conduct of an admitted and licensed attorney, that conduct could, and no doubt would, have been brought to the attention of the Appellate Division, which has power under the law to discipline attorneys for improper and unprofessional conduct. It has not, however, nor has any other public officer or body like jurisdiction with reference to a corporation offending, as the learned justice has found that the corporation in that case did offend, which is one of the strongest reasons why work of this kind should be confined to the legal profession. Everything that was said by the Court of Appeals in Matter of Co-operative Law Company, 198 N. Y. 479, applies with equal force to legal proceedings before boards and commissions as to actions and proceedings in court, and it is no more appropriate or in line with sound public policy that corporations should be permitted to practice before the one than before the other kind of tribunal.

Since the above opinion was written, decisions have been handed down by the Supreme Court, Appellate Division, First Department (People ex rel. Samuel Floersheimer, Respondent, against Lawson, Purdy et al., as Commissioners, etc., and People ex rel. Trojan Realty Company against Lawson, Purdy et al., as Commissioners, etc., October, 1916, not yet reported), with opinions which lend strong support to the conclusions which I have reached that the respondent corporation, by assuming to appear for and represent property owners before the Board of Commissioners of Taxes and Assessments of the city of New York in proceedings instituted by it for the cancellation or reduction of assessments for taxation, has violated section 280 of the Penal Law, and has exercised powers and privileges not conferred upon it by law, and in excess of its corporate powers.

I am satisfied that the officers of respondent corporation have not been guilty of wilful violation of the law in the respect mentioned, but have assumed and believed that the corporation had a lawful right to engage in such business, and that the ends of justice will be served without the beginning and prosecution of an action to annul respondent's corporate existence if it will voluntarily discontinue the character of business here considered and disapproved.

RECOMMENDATION

I recommend that the application of the petitioner herein be granted and that an action be commenced (permission of the court having first been obtained) for the annulment of respondent's charter and corporate existence unless it shall and does immediately and permanently and completely cease to appear for and represent property owners in proceedings before the Commissioners of Taxes and Assessments of the city of New York, for the reduction or cancellation of assessments, or otherwise to engage in the practice of law, and shall, on or before January 15, 1917, file with this office satisfactory proof by affidavit, of its compliance with this requirement, and its stipulation duly acknowledged that it will not in the future engage in any way in the unlawful business herein disapproved.

Dated, December 18, 1916.

SANFORD W. SMITH,
Second Deputy Attorney-General

Approved December 18, 1916.

EGBURT E. WOODBURY,
Attorney-General.

By MERTON E. LEWIS,
First Deputy Attorney-General.

OPINIONS RENDERED TO THE STATE LAND BOARD

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OPINIONS RENDERED TO THE STATE LAND BOARD

STATE OF NEW YORK
OFFICE OF THE ATTORNEY-GENERAL

ALBANY, March 29, 1916.

Before the Commissioners of the Land Office.

In the Matter of the Application of **MARY BOGART CONKLIN** to the Commissioners of the Land Office for the Release of the Interest Escheated to the State in Lands Located in the Village of Mamaroneck, Westchester County, N. Y., upon the Death of her Husband, **GEORGE EDWARD GROVER**, without Heirs.

To the Commissioners of the Land Office:

Gentlemen.— The petition and additional papers filed herewith show that George Edward Grover purchased from William H. Gedney and wife, by warranty deed, dated December 30, 1893, recorded in Westchester County Register's office, a lot of land in the village of Mamaroneck, town of Rye, in said county, known as Lot No. 14 on map of William H. Gedney, property fronting 75 feet on River avenue and on each side between 139 and 140 feet.

Satisfactory proof has been furnished to me that said George Edward Grover married the petitioner, then known as Mary Bogart, in the village of Mamaroneck, on December 26, 1891. The aforesaid premises were mortgaged by George Edward Grover and Mary, his wife, in 1894, and again in 1903, by mortgages which have since been cancelled of record. The last of said mortgages, being one for \$1,200 to the Provident Savings Loan Investment Co., was discharged September 17, 1907, by the petitioner, after her husband's death. George Edward Grover died intestate March 28, 1906, without heirs, but leaving the petitioner, his widow. The petitioner alleges that since her husband's death she has not only paid off the balance of \$1,000 of said \$1,200 mortgage, but

has also paid the taxes on said property and has kept said property in repair for upwards of nine years; that said house and lot is the only home the petitioner has; a notice of this application was duly advertised in a newspaper published in Westchester county, and a copy thereof was duly posted on the court house door.

The application is made in accordance with the statute and the rules and regulations of the Commissioners of the Land Office. The said premises which are now free and clear from all incumbrances, are said to be of the value of \$3,000. If your honorable board see fit to grant the prayer of this petition they have ample power to do so, and in that case the grant should be made without consideration, in pursuance of the statutes.

Respectfully submitted,

E. E. WOODBURY,
Attorney-General.

STATE OF NEW YORK
OFFICE OF THE ATTORNEY-GENERAL

J. ALBANY, March 29, 1916.

Before the Commissioners of the Land Office.

In the Matter of the Application of HENRY F. WALLACE for the Release of the State's Interest in Certain Lands in the City of Oswego, which Escheated on the Death of his Wife, JANE B. WALLACE, without Heirs.

To the Commissioners of the Land Office:

Gentlemen.—The accompanying papers show that Jane B. Wallace purchased subdivision No. 6 of Lot 109 of Military Lot No. 6, Van Buren Tract, in the city of Oswego, Oswego county, being 51 feet wide on Dublin street and 130 feet deep, consisting of the dwelling-house and lot known as No. 31 Dublin street, in the city of Oswego, by deed from Anne Ferguson, dated July 5, 1912, recorded April 17, 1913, in Oswego County Clerk's office. Jane B. Wallace died October 3, 1915, at the St. Lawrence State Hospital, Ogdensburg, N. Y., seized of said premises, which are

stated to be of the value of \$2,500. She died intestate and left no heirs. She left surviving, however, her husband, Henry F. Wallace, the petitioner, to whom she was married at Putnam, Conn., on October 6, 1869. Said Jane B. Wallace and petitioner had lived together as husband and wife since the time of said marriage, until about two months prior to decedent's death, at which time she was committed to said hospital by reason of mental incapacity under an order of the Oswego county judge in lunacy proceedings: No children were ever born of said marriage.

The petitioner alleges that the said property was purchased in the name of his deceased wife, Jane B. Wallace, with funds realized from the sale of property formerly owned by him in the city of Buffalo and that the petitioner after purchasing the property made alterations and considerable repairs thereon at his own personal expense; that he has paid from his own resources all the expenses incidental to the commission of his deceased wife to the State hospital, the expenses of her maintenance there and her funeral expenses, and notice of this application was duly advertised in a newspaper published in the city of Oswego for three consecutive weeks commencing December 21, 1915, and a copy of said notice has been posted in various public places in the city of Oswego.

The application is in accordance with the statute and the rules and regulations of the Land Office, and as the petitioner is the surviving husband of decedent, if your honorable board decides to grant this application, it must be without consideration in accordance with the terms of the statute.

Respectfully submitted,

E. E. WOODBURY,

Attorney-General.

STATE OF NEW YORK
OFFICE OF THE ATTORNEY-GENERAL

ALBANY, April 13, 1916.

Before the Land Board.

In the Matter of the Application of THEODORE W. KRAMER for a Grant of Land under the Waters of the Atlantic Ocean, at Coney Island, Kings County.

To the Commissioners of the Land Office:

Gentlemen.— I do hereby certify that I have examined the application of Theodore W. Kramer, for a grant of land under water for restricted beneficial enjoyment, and certify that the same is made in accordance with the provisions of the statutes relating thereto, and also that it is made in accordance with the rules and regulations of the Commissioners of the Land Office.

Attention is called, however, to the decision of the Appellate Division, Second Department, in the case of the People v. Steeple-chase Park Company et al., 165 App. Div. 231, which case is now on appeal to the Court of Appeals, wherein the Appellate Division held as to water grants adjoining the lands under water applied for by this applicant, as shown on his application map, which grants were made in the years 1897 and 1898, to one Emilie Huber and to Paul Weidmann, the former being in form an absolute full beneficial enjoyment grant, and the Weidmann grant containing restrictions that the patentees should not erect any fences or obstructions of any kind on the land under water therein granted that would in any way obstruct the public from having free and unmolested rights to cross and recross the land under water between high and low-water marks, as they then existed or might thereafter exist — that both of said grants must be deemed subject, by necessary implication, to the rights of the public in the foreshore, as decided in Barnes v. Midland Railroad Terminal Company, 193 N. Y. 378, and the Appellate Division said that it was clearly beyond the powers of the Commissioners of the Land Office to convey an unqualified fee in such foreshore for private purposes — citing Matter of Long Sault Development Co., 212 N. Y. 1, and Coxe v. The State, 144 N. Y. 396.

I would therefore suggest that, in addition to the usual restrictions and conditions contained in water grants in Greater New York, any letters-patent that may be granted in this application shall contain also the express condition that "the said patentee, his heirs and assigns, shall not make, erect or maintain, or cause or allow to be made, erected or maintained, any fence, building, excavation or other obstruction of any kind, in or upon land lying between the line of high and low-water mark, as they now exist, or hereafter shall exist, that shall in any manner obstruct, interfere with, inconvenience or prevent any person or persons from or in crossing and recrossing, in any manner or way, said land between high and low-water mark."

This is the exact language used in the former grant to the Midland Railroad Terminal Company, which was passed upon in Barnes v. Midland Railroad Terminal Company, 193 N. Y. 378, and is similar in form to many grants of land under the waters of the Atlantic ocean at Coney Island.

E. E. WOODBURY,
Attorney-General.

STATE OF NEW YORK
OFFICE OF THE ATTORNEY-GENERAL
ALBANY, April 19, 1916.

Before the Commissioners of the Land Office.

In the Matter of the Application of HENRY WILSON for a Release of Certain Parcels of Land in the Town of Greenburgh, Westchester County, and Valley Stream, Nassau County, which Escheated upon the Death of his Wife, ELIZA WILSON, without Heirs.

To the Commissioners of the Land Office:

Gentlemen.—The petition herein and corroborative affidavits and other papers show that on April 12, 1893, Eliza Wilson purchased from the Elmsford Improvement Company Lots 9, 10, 11, 12, 13, 14, 30 and 32 in Block 15, on map of building lots and

villa sites at Elmsford Park, Westchester county, made by Ward Carpenter & Sons, engineers, May 5, 1891, and that on June 14, 1895, said Eliza Wilson purchased of the Royal Land Company of New York, Lots 457 and 458, at Valley Stream, Queens (now Nassau) county, on map 3 of Irma Park property of said Royal Land Company.

The applicant alleges that said lands were paid for by himself from his earnings and were not paid for by any money belonging to said Eliza Wilson, but title was taken in her name in order that, should applicant die before his wife, she would be saved the expense of administration upon his estate. Applicant has resided upon the lands in Elmsford, Westchester county, ever since the purchase thereof and erected a dwelling-house thereon and has paid all taxes imposed upon both properties. The said Eliza Wilson died intestate March 1, 1905, from a sudden paralytic stroke, and was thus prevented from making her will during her last illness. She left no heirs-at-law either in this country or in England, where she was born.

The real estate in Westchester county is said to be of the value of three thousand dollars, and the lots in Nassau county are unimproved and said to be worth five hundred dollars. The application is made in accordance with the provisions of the statutes and the rules and regulations of the Commissioners of the Land Office. I am of the opinion that should your honorable body see fit to grant the prayer of this petition the same should be made without consideration, as provided by the statute.

Respectfully submitted,

E. E. WOODBURY,

Attorney-General.

FRANK M. WILLIAMS,

State Engineer and Surveyor.

STATE OF NEW YORK
OFFICE OF THE ATTORNEY-GENERAL

ALBANY, April 26, 1916.

Before the Commissioners of the Land Office.

In the Matter of the Application of the PRINCES BAY OYSTER COMPANY, LTD., for a Grant of Land under the Waters of Princes Bay, Staten Island.

To the Commissioners of the Land Office:

Gentlemen.—At the last meeting of the board, held March 29, 1916, the foregoing application was under consideration and Mr. George A. Wood, the treasurer of the company, appeared and stated that there was a controversy between the applicant and the adjoining owner as to the division line between their properties which would incur a large expense in settlement, and asked that in consideration thereof the reappraisal of \$600 per acre be reduced to \$200 per acre, as reported by former appraisers in 1912.

The matter was referred to the Standing Committee and Mr. Wood was requested to furnish the committee with the names and addresses of adjoining owners. Since said meeting Mr. Wood has conferred with your committee and now transmits the enclosed letter wherein he states that he had made an unintentional misstatement regarding adjoining boundary lines. He now says that the parcel of land applied for does not include any land claimed by any adjoining owner, but that the dispute as to the line arises from the fact that the previous Land Board granted to an adjoining property owner land under water which the Princes Bay Oyster Company now claims is adjacent to the company's upland. Mr. Wood, on behalf of the company, states that they are very anxious to have the matter disposed of without any further delay, and are now willing to take the grant at the value placed on the land by the appraisers.

Respectfully submitted,

E. E. WOODBURY,

Attorney-General.

FRANK M. WILLIAMS,

State Engineer and Surveyor. 

STATE OF NEW YORK
OFFICE OF THE ATTORNEY-GENERAL

ALBANY, April 26, 1916.

Before the Commissioners of the Land Office.

In the Matter of the Application of WILLIAM KROPFF, Trustee,
Etc., for an Extension of Three Years' Time within which to
comply with the conditions of Letters Patent for Lands under
Water of Pugsley's Creek, in the Borough of the Bronx, New
York City.

To the Commissioners of the Land Office:

Gentlemen.— This is an application for a third extension of a water grant originally made in the year 1908 to Augusta E. Hemmer and others. A protest was filed against this application by the Commissioner of Docks of the city of New York upon the ground that the title of the bed of Pugsley's Creek was in the city of New York and not in the State.

Your committee heard the attorney for the applicant and Hon. E. J. Freeman, Assistant Corporation Counsel, for the city of New York, at a hearing held March 23, 1916, wherein it appeared that Mrs. Hemmer, the original patentee, died several years ago, and the reason that the original improvement contemplated by the letters patent was not made, was due to complications in the management and settlement of her estate and the inability of the trustee to raise money through the sale of real estate. Your committee would therefore recommend that a renewal grant be made for three years notwithstanding the objections of the city of New York, and if the city chooses to test the validity of their alleged title in the courts they may do so. To refuse to make the grant would be to create a forfeiture.

Respectfully submitted,

E. E. WOODBURY,
Attorney-General.

FRANK M. WILLIAMS,
State Engineer and Surveyor.

STATE OF NEW YORK
OFFICE OF THE ATTORNEY-GENERAL

ALBANY, May 8, 1916.

Before the Standing Committee on the Hearing of Remonstrances of the Commissioners of the Land Office.

In the Matter of the Application of ANDREW RADEL for a Grant of Land under Water of Peconic Bay, in the Town of Southold, Suffolk County, for the Purposes of Beneficial Enjoyment.

To the Commissioners of the Land Office:

Gentlemen.—This is an old application which was referred to the Standing Committee on July 19, 1911. Remonstrances were filed by the Union Wharf Company of Greenport, the Greenport Board of Trade and the Village of Greenport, and also by George S. Reeves and various other inhabitants of Greenport. The matter was heard by your committee on December 9, 1915, and March 23, 1916, since which time the applicant has filed an amended map and description. The applicant is now willing to accept a grant for 1.781 acres instead of 3.3038 acres, as applied for. The greater part of the lands embraced within the amended map and description were granted on December 23, 1874, to H. Fordham and S. B. Tuthill for purposes of commerce, said grant being for 1.288 acres. In addition to the land covered by the old Fordham and Tuthill grant, the applicant now desires by his amended map and description to obtain the grant for certain lands between the original high-water mark and the present shore line, both north and south of the lines of the old grant to cover lands which have been filled in and occupied; also a triangular piece of land north of the old grant and extending out to the bulkhead and pier line as established by the War Department, to include a dock which the applicant placed upon the land under water in front of his uplands; and also lands between the exterior line of the old grant and said bulkhead and pier line.

Your committee is of the opinion that the decision in Thousand Island Steamboat Co. v. Visger, 179 N. Y. 206, has no application to this case, for the reason that the docks erected upon the commerce grant have never been used by the public at any time and

that the adjoining upland has always been the private property of the applicant and his predecessors in title, and that there is no public street or way leading to the docks erected upon the lands granted for commercial purposes. These docks are and always have been maintained as private docks. We therefore recommend that the remonstrances be overruled as to the lands covered by the amended map and description, and that a grant thereof be made to the applicant for purposes of beneficial enjoyment, subject, however, to any rights (if any) which the Union Wharf Company may have therein, or any part thereof, and without recourse to the State should any such rights of the Union Wharf Company be established. The acceptance of the proposed grant by the applicant shall be deemed a surrender of the grant of 1874, and shall, thereupon, with the consent of Andrew Radel, the owner of the adjacent upland, be revoked, cancelled and annulled.

Your committee further recommends that as to those portions of the land originally applied for and not now included within the lines of the amended map and description, final action shall be deferred thereon as follows: As to that portion lying between the land now proposed to be granted and the northerly and easterly side of the line of the land as originally applied for, further action be deferred pending the adjustment by mutual consent or the adjudication by the courts of the rights, if any, of the Union Wharf Company in said portion of land or any part thereof. Upon the adjustment or adjudication of said rights the applicant or his successors in title should be permitted to again bring on this application for further hearing upon giving thirty days' notice in writing to the Union Wharf Company or its successors, of his intentions so to do.

As to that portion lying between the land proposed to be granted and the southerly and easterly line of the land as originally applied for, further action is deferred until the close of the session of the Legislature of 1917, in order that if it be so advised the village of Greenport may appeal to the Legislature during such session for legislation to permit such village to acquire the right to erect a wharf at the foot of Bay avenue; should no such law be enacted during the session of 1917, then the applicant or his successor may

again bring on this application for a further hearing, upon giving thirty days' notice in writing to the village of Greenport of his intention so to do.

Respectfully submitted,

E. E. WOODBURY,

Attorney-General.

F. M. WILLIAMS,

State Engineer and Surveyor.

STATE OF NEW YORK

OFFICE OF THE ATTORNEY-GENERAL

ALBANY, May 15, 1916.

Before the Standing Committee on the Hearing of Remonstrances of the Commissioners of the Land Office.

In the Matter of the Application of ATLANTIC TERRA COTTA COMPANY for a Grant of Land under Water at Tottenville, Staten Island.

To the Commissioners of the Land Office:

Gentlemen.— A remonstrance to this application herein was filed by the American Title and Trust Company, Wilmington, Delaware, who claim to be the owners under letters patent granted to one Lancaster Symes, in the year 1708, of all vacant and unappropriated land on Staten Island.

The matter has been heard by your committee and the applicant and the remonstrant have each submitted an abstract of title.

The Atlantic Terra Cotta Company claims title through a grant made to Christopher Billopp under two colonial letters patent, one dated March 25, 1676, and the other dated in 1687, both of which were long prior to the Symes grant. It is therefore our opinion that the remonstrance should be overruled; however, as the application only asks for a narrow strip of land lying between the pier and bulkhead line, approved by the Secretary of War March 4, 1890, and the bulkhead line approved by the Secretary of War

September 28, 1911, and the applicant now enjoying two water grants, one made to Sarah F. Kraft April 27, 1892, and the other made to the applicant January 2, 1913, out to the said pier and bulkhead line of March 4, 1890, and it appearing by the official water grant maps made by the State Engineer and Surveyor that the lines of 1890 and 1911 coincide, the matter was referred by him to Lieutenant-Colonel C. H. McKinstry of the Corps of Engineers, United States Engineer's office, 39 Whitehall street, New York city, who, in his letter dated May 9, 1916, to the State Engineer and Surveyor, reports:

“That the bulkhead line approved by the Secretary of War September 28, 1911, is identical with the pierhead and bulkhead line approved by the Secretary of War March 4, 1890, in front of lands owned by the Atlantic Terra Cotta Company of Tottenville in the Borough of Richmond on the Arthur Kill.”

It therefore appearing that there are no lands under water embraced within the application of the Atlantic Terra Cotta Company that are subject to grant, we would recommend that this application be denied.

Respectfully submitted,

E. E. WOODBURY,

Attorney-General.

JAMES L. WELLS,

State Treasurer.

FRANK M. WILLIAMS,

State Engineer and Surveyor.

STATE OF NEW YORK
OFFICE OF THE ATTORNEY-GENERAL
ALBANY, May 16, 1916.

Before the Commissioners of the Land Office.

In the Matter of the Petition of CHARLES RILEY for a Release of the State's Interest in Premises known as No. 82 Hopkins Avenue, Long Island City, Queens County, which Escheated to the State upon the Death of his Stepmother, FANNIE RILEY.

To the Commissioners of the Land Office:

Gentlemen.—The petition herein and corroborative affidavits and abstract of title show that Fannie Riley purchased Lot No. 338 on map of property at Ravenswood, in the vicinity of Hallock's Cove, L. I., on the west side of Jay street (now Hopkins avenue), in 1883. At that time she was the wife of Thomas Riley, the father of the petitioner, his mother having previously died, and said Fannie Riley being his stepmother. The said premises are said to have been purchased with funds belonging to petitioner's father. Fannie Riley died intestate in February, 1890, at Long Island City, leaving no known heirs, but leaving her said husband her surviving, and seized of said premises, which are said to be of the value of \$1,500. Thomas Riley, the husband of Fannie Riley, died intestate in Long Island City in or about the year 1899, leaving the petitioner, his son and only heir, the petitioner claiming as the only heir-at-law of his father, the husband of said Fannie Riley, and by reason of over twenty years' possession, erected a substantial building on said premises in the belief that he had a valid title thereto. He has also paid many years' taxes and assessments upon the said premises.

The petitioner also claims that he is equitably entitled to said property by reason of an instrument in writing signed by Fannie Riley and endorsed on the original deed to her, whereby she assigned and transferred to Charles Riley, the petitioner, all her right, title and interest in said premises. The assignment was not, however, duly acknowledged, although a notary public's name was attached to said transfer. The petitioner is now advised by his

counsel that said assignment is void because of defects of form and execution and therefore prays that the Commissioners of the Land Office will release to him the State's interest in the said lands.

Section 62 of the Public Lands Law provides that the Commissioners may release the State's interest in a case of this kind and that a conveyance so made to any petitioner who is the heir-at-law of a surviving husband, shall be without consideration when the value of the property sought to be released does not exceed \$10,000.

The petitioner further shows that the premises in question are all the land that Fannie Riley died seized of.

Your honorable body have full power to grant the relief prayed for in the petition.

Respectfully submitted,

E. E. WOODBURY,

Attorney-General.

STATE OF NEW YORK
OFFICE OF THE ATTORNEY-GENERAL

ALBANY, July 12, 1916.

Before the Standing Committee on the Hearing of Remonstrances of the Commissioners of the Land Office.

In the Matter of the Application of HENRY MEYER, Hempstead Turnpike and Two Hundred and Twenty-second Street, Borough of Queens, New York City; JOHN H. MAHNKEN, Freeport, N. Y., and PATRICK J. CARLIN, 270 Washington Avenue, Borough of Brooklyn, New York City, for a Grant of Land under the Waters of Arthur Kill, at Rossville, County of Richmond, for the purposes of beneficial enjoyment.

To the Commissioners of the Land Office:

Gentlemen.—A remonstrance to this application was filed by the American Title and Trust Company of Wilmington, Delaware, claiming to be the owners under letters patent granted to Lancaster Symes in the year 1708 of all vacant and unappropriated land on Staten Island.

A communication was also received from Edward P. Doyle, representing the Realty Notice Corporation, asking for an opportunity to be heard on this application. On July 11, 1916, a second letter was received from Mr. Doyle stating that he had no objection to the grant being made to the applicants.

The matter has been heard by your committee, no appearance being made by the American Title and Trust Company.

No abstracts of title have been presented. The applicants, however submitted copies of nineteen deeds duly certified by the county clerk of Richmond county as having been recorded in his office, which show record chain of title in the applicants to the uplands in front of the premises for which the patent is applied for, for a period of over thirty years; and also by sworn testimony proved occupation of the property for a period of over twenty years.

The office of the corporation counsel of the city of New York states that "the City of New York makes no claim of title to the lands under water applied for but requests that in any letters patent that may be issued, the usual terms and conditions be inserted."

It is the judgment of your committee that the remonstrance should be overruled and that the application take the usual course of uncontested applications.

Respectfully submitted,

E. E. WOODBURY,

Attorney-General.

FRANK S. WILLIAMS,

State Engineer.

JAMES L. WELLS,

State Treasurer.

STATE OF NEW YORK
OFFICE OF THE ATTORNEY-GENERAL

ALBANY, July 12, 1916.

Before the Standing Committee on the Hearing of Remonstrances of the Commissioners of the Land Office.

In the Matter of the Application of the CRUCIBLE STEEL COMPANY OF AMERICA for Grant of Abandoned Erie Canal Lands in the City of Syracuse, New York.

To the Commissioners of the Land Office:

Gentlemen.—On December 11, 1914, the Canal Board abandoned the lands applied for in this application.

On December 23, 1914, the Mutual Pipe Line Company duly applied to the Commissioners of the Land Office for a grant of these abandoned lands.

On November 30, 1915, the Canal Board rescinded the action of the Canal Board of December 11, 1915, abandoning the lands in question.

Thereafter and on April 11, 1916, the Canal Board abandoned said lands and on May 11, 1916, the Crucible Steel Company of America, the applicant herein, applied to the Commissioners of the Land Office, under article 4 of chapter 50 of the Laws of 1909, for a grant or conveyance of said abandoned lands.

On May 25, 1916, the Mutual Pipe Line Company filed a protest against the granting of the petition herein, claiming that the action of the Canal Board of November 30, 1915, rescinding the resolution of abandonment of December 11, 1914, was illegal and void and inoperative because the said lands had already been abandoned and could not again be abandoned against the rights of the protestant.

The matter has been heard by your committee, no appearance being made by the Mutual Pipe Line Company.

It is the judgment of your committee that the remonstrance should be overruled and that the application take the usual course of uncontested applications.

Respectfully submitted,

E. E. WOODBURY,
Attorney-General.

FRANK M. WILLIAMS,
State Engineer and Surveyor.

JAMES L. WELLS,
State Treasurer.

STATE OF NEW YORK
OFFICE OF THE ATTORNEY-GENERAL

ALBANY, July 25, 1916.

In the Matter of the Application of THE MIDLAND BEACH COMPANY for a Determination of the "High-Water Line" at Midland Beach, Staten Island, N. Y.

The Commissioners of the Land Office, Albany, N. Y.:

Gentlemen.— It appears that in 1902 the Commissioners of the Land Office granted to The Midland Railroad Terminal Company lands under water and between "high and low-water line" at Midland Beach, Staten Island, N. Y., for the purposes specified in the grant, making reservations for the benefit of the public for use of the foreshore "between the line of high and low water as they now exist or hereafter shall exist." The applicant has succeeded to the title of the Midland Railroad Terminal Company and makes this application to have the high-water line which marks the shoreward line of this grant surveyed and determined by the State Engineer and Surveyor.

The matter was referred to the State Engineer and Surveyor for investigation and report. The State Engineer and Surveyor made his report to this board, under date of October 25, 1915, as follows:

"The patent granted in 1902 to the predecessor of the Midland Beach Company contained the clause 'between the line of high and low water as they now exist or hereafter shall exist.' Water grant maps show the line of 'high water' at three different locations, and to determine the line of 'high water' as it 'hereafter shall exist' would be somewhat of a task inasmuch as the fore-shore, which faces the ocean, being of sand and gravel, would probably be changed by every storm and the line of deep water is now some 1,500 feet from the shore.

"It is a question in my mind as to whether or not, under the terms of the patent that has been granted, the State is obligated to determine the location of 'high water' line as requested in the petition of the Midland Beach Company. It would undoubtedly be possible to locate the 'high water' line as it exists to-day, but as to whether or not the State should take this action I am not prepared to say, and I therefore return the papers to this Board for directions as to whether or not I shall proceed in attempting to locate the 'high water' line at this location."

Thereupon the matter was referred to the Attorney-General for report as to the legal right of the State to establish said "high water line."

It would appear that the Midland Railroad Terminal Company did not comply with the reservations made for the benefit of the public to keep the foreshore open and free from obstructions, but on the contrary obstructed and endeavored to close the same to the exclusion of the public. Such being the condition, one Sarah H. Barnes et al., owners of adjoining uplands, some years ago brought an action against The Midland Railroad Terminal Company praying for an injunction restraining the obstruction of said foreshore and claiming special damage by reason of such obstruction. This action was twice heard by the Court of Appeals and finally resulted in a decision handed down May 2, 1916; upon which decision judgment has been entered. Among other things the judgment provides:

"That the defendant, the Midland Railroad Terminal Company, be, and it is hereby enjoined and restrained from obstructing the passage of the public under its pier at Midland Beach between the lines of high and low-water mark, as they now exist or hereafter shall exist; from maintaining its pier in such a form as to interfere with such passage over the entire width of fore-shore between the lines aforesaid; and from denying to the public passage over its pier at any point where passage under it is now or shall hereafter be obstructed; and that said defendant also be, and it hereby is, enjoined and restrained from obstructing in any manner the passage of the public over any other portion of its said beach between the lines of high and low-water mark, as they now exist or hereafter shall exist, except by the erection of piers or like obstructions necessary to the reasonable enjoyment of its uplands, and so erected as to involve a minimum degree of interference with the public right of passage."

The action is still pending for the purpose of determining the amount of damages sustained by the plaintiffs in said action and such issue is yet undetermined. It seems to me that the purpose of the applicant in asking to have the high-water line determined is either for its influence upon the remaining issue in this action as to the amount of damages which have been suffered by the plaintiff or for the purpose of establishing "high-water line" to the end that such line may be permanently established and preserved by structures erected thereon.

In view of the fact that under the restrictions contained in this grant, the right of the public was intended to be preserved "between the line of high and low-water mark, as they now exist or hereafter shall exist," renders it improper for the Commissioners of the Land Office or the State Engineer and Surveyor to definitely fix the high-water line to the end that by the erection of structures it shall never hereafter change through process of erosion or accretion. I am not passing upon the question as to what right the upland owners may have in erecting such a structure at high-water line as it may exist at a given time, but it seems to me inadvisable for the Commissioners of the Land Office to authorize the fixing of such line which may have the possible

effect of limiting the terms of the grant to a fixed location rather than a change of location contemplated by the language "between the lines of high and low-water mark, *as they now exist or hereafter shall exist.*"

Again I do not deem it advisable for the Commissioners of the Land Office to direct the fixing of this line when its direct effect may be to influence the issues in the pending action above referred to.

Furthermore, I know of no legal obligation on the part of the State to establish this line and the direction for its establishment will form a precedent for the establishment of similar lines in respect of every grant which the State has heretofore made.

I assume that in the absence of legislation the Commissioners of the Land Office would not care to undertake the establishment of these lines with respect to grants generally, and to establish this precedent, which would almost seem to commit the Commission to such a policy.

In view of all the circumstances, I recommend that the application be denied.

Respectfully yours,

E. E. WOODBURY,
Attorney-General.

STATE OF NEW YORK
OFFICE OF THE ATTORNEY-GENERAL

ALBANY, July 26. 1916.

Before the Commissioners of the Land Office.

In the Matter of the Application of FRANK HAMLIN and WILLIAM HAMLIN, as Surviving Executors, Etc., of CICERO J. HAMLIN, Deceased, for the Advertising for Sale of a Certain Parcel of Real Property, Situated on Genesee Street near Spruce Street, in the City of Buffalo.

SUPPLEMENTAL REPORT

On December 2, 1914, my predecessor, Attorney-General Parsons, upon the recommendation of his deputy (Mr. Chambers)

reported that the interest of the people in the entire property above mentioned be sold at public auction in accordance with the provisions of law in such case made and provided, and that such interest be sold to the highest bidder and that no bid be accepted which shall be less than the sum of \$500.00 and expenses of sale.

At the time the report was submitted there was no provision made for taking care of the action pending for the registration of the title of the said property in the name of said applicants, which was referred to in the said report of the Attorney-General. Had the property been sold at \$500.00 and expenses, and a quit-claim deed been given to petitioners they would have unquestionably been successful on the new trial of the action, probably carrying the costs of the appeal to them. That fact was taken into consideration in fixing the price of \$500.00.

In a letter under date of June 28, 1916, to this Commission from Bartholomew & Bartholomew, attorneys for the applicants, they stipulated as follows:

“ We have had a conference with Deputy Attorney-General Wilber W. Chambers (who drafted the report hereinbefore referred to) regarding this upset figure, and through his insistence and against our better judgment this figure of \$300.00 has been increased to \$350.00. This upset price, to-wit, \$350.00, we are now offering to your honorable board for the interest of the State in said land. This offer is conditioned upon receipt by them of a quit-claim deed from the State of New York, and at the same time the entering into of a stipulation by which the title registration proceedings instituted by the Hamlin estate and still pending undetermined, may be completed, registering the title in the Hamlin estate without costs as against any parties.”

Taking into consideration the proposition submitted by applicants that they are willing to pay \$350.00 and expenses of sale for the property, and are also willing to stipulate that they will ask no costs against the People of the State of New York in the title registration proceedings referred to, I recommend that the proposition be accepted.

Before the matter is closed there should be procured from the applicants the stipulation referred to.

Dated, Albany, N. Y., July 26, 1916.

Respectfully submitted,

E. E. WOODBURY,

Attorney-General.

STATE OF NEW YORK
OFFICE OF THE ATTORNEY-GENERAL

ALBANY, July 26. 1916.

Before the Standing Committee on the Hearing of Remonstrances of the Commissioners of the Land Office.

In the Matter of the Application of THE NATIONAL CONDUIT AND CABLE COMPANY for a Grant of Land Under Water in the Village of Hastings-on-Hudson, Westchester County, N. Y.

To the Commissioners of the Land Office:

Gentlemen.—This application was filed September 21, 1911, for a grant of three parcels of land, containing in all over twenty-one acres under the waters of the Hudson river at Hastings. Several remonstrances to this application were filed, and on March 30, 1912, the standing committee made the following report:

“The applicants’ uplands consist of a narrow strip adjoining the east line of the New York Central and Hudson River Railroad Company’s right of way, between the lands of the New York Orphan Asylum on the south and of August Zinser Realty Company on the north. They extend north and south about 1,500 feet and varying in width from 10 feet on the south to 163 feet on the north. The grant is applied for to enable applicants to fill in the same and erect docks and factories thereon for the manufacture of brass and copper wire, tubing, sheets and electric cables. Remonstrances were filed by the Pinecrest Residents’ Association, the Greystone Association, the Orphan Asylum Society and William S. Rowley

upon the ground that the erection and maintenance of the proposed factory will create a nuisance and prove injurious to the use of the adjoining lands of the applicants for residential purposes. The remonstrants further urge that the deed from William S. Rowley to the Pinecrest Company dated March 2, 1909, under which the applicants and some of the remonstrants claim title, contained a covenant and restriction running with the land that the grantee and its assigns shall not at any time thereafter erect, suffer or permit on the lands thereby conveyed any noxious or offensive business whatever and that the title deed to the National Conduit and Cable Company of their uplands dated June 23, 1911, conveyed the same expressly subject to said covenant against nuisances contained in the aforesaid deed, and they further offered in evidence a map of Pinecrest on the Hudson, the property of the Metropolis Extension Company, the grantee of the Pinecrest Company, showing that the greater part of the uplands of the applicant and upon which it bases its claim to riparian rights is laid out as the 'River Road,' a private road fifty feet wide the greater part of the distance, with a ten feet lane along the southern extremity, which with other roads, were reserved on the sale of lots. They further claim that they purchased lots and erected residences thereon upon the faith that the entire neighborhood would continue to be a strictly high class residential property and that no factories would ever be built thereon and that the water front would only be used by yacht and rowing clubs and that the Hudson river scenery would be without obstruction of any kind. The remonstrants further urge that if a grant is made to the applicants they would have no standing to review the action of the Commissioners and that the Land Board in the exercise of their discretion should refuse to make this grant to their detriment claiming it would largely depreciate the value of their property.

"The affidavits of the applicants' and remonstrants' witnesses are conflicting as to whether in fact the erection and maintenance of applicants' proposed factory would create a nuisance.

"Parcel 'C,' being the largest parcel of the lands under water applied for, extends out into the Hudson river about two hundred feet further than the exterior line of the water grant made to Zinser & Company, April 1, 1907, on the north, and also, about four hundred fifty feet beyond the exterior line of the grant made to the New York Orphan Asylum on June 26, 1872, on the south.

"The description of the north of Parcel 'C' appears to be defective in that said line is said to coincide with the southerly line of grants made to William Menek and the Zinsser Company, when in reality there appears to be a gore between the same. Apparently this description should be corrected.

"Under the circumstances set forth above your committee are of the opinion that the application should be denied.

Respectfully submitted,

THOMAS CARMODY,

Attorney-General.

JOHN J. KENNEDY,

State Treasurer.

J. A. BENSEL,

State Engineer and Surveyor."

On April 25, 1912, when said report was presented for consideration, it was laid upon the table at the request of the applicants' attorney. (See Land Board Minutes, 1912, pp. 68-71.)

Thereafter and on December 12, 1912, upon the request of the applicants' counsel, the matter was taken from the table and referred back to the standing committee for a rehearing. Further hearings were had thereon in 1912 and 1913, at which additional affidavits were filed by the applicant, and counter affidavits submitted by the attorneys for the various remonstrants.

On October 25, 1913, Attorney-General Thomas Carmody and John A. Bensel, State Engineer and Surveyor, again reported to the Land Board that the additional evidence submitted to them "Does not warrant us in changing our views in the matter, and we again recommend denial of the application." This report was submitted to the Land Board at a meeting held December 16, 1913, and at this meeting attorneys for the applicant presented a

resolution of the board of trustees of the village of Hastings favoring the granting of the application of the National Conduit and Cable Company; whereupon the matter was referred to the State Engineer and Surveyor to visit Hastings-on-Hudson at his convenience, examine into the physical conditions and report to the Board whether or not he thinks the objections heretofore considered as sufficient to defeat this application are in fact sufficient after the physical examination.

At a further meeting of the Land Board held on April 27, 1916, the present State Engineer and Surveyor reported under the resolution of December 13, 1913, that he had examined the application and the maps and descriptions agreed. He said further:

"I would, however, respectfully recommend that in view of the fact that large columns of black smoke issue from the chimneys of their factory at present, that some provisions be made, should factory buildings be erected on the lands under water that are applied for, whereby this objection could be eliminated. It is respectfully suggested whether, in the judgment of the Commissioners of the Land Office, this objection could be eliminated by inserting the following clause or a clause to this effect:

"These letters-patent are issued, however, subject to the following terms and conditions, to wit: that if on said lands, or any portion thereof, a factory building be erected and steam power be employed therein, then and in that event, said plant shall be equipped with smoke consumers of such capacity as adequately and effectually to consume the smoke arising from the consumption of any fuel used therein; if at any time, during the existence of this grant, such smoke consumers be damaged or otherwise out of condition, then said power shall be shut off until the said smoke consumers are fully repaired; and the said people of the State of New York, on the violation of this condition, may give notice to the owners of said land, and in the event of the continued violation thereof for a period of thirty days from the date of this notice, this grant shall cease and determine and become null and void."

and the Land Board, after an extended discussion, gave the parties time to file briefs on the law and the facts with the Board. Such briefs were duly filed and on June 26, 1916, the members of your committee visited Hastings-on-Hudson in a body for a full inspection of the premises and also a hearing upon the ground. In addition to the president and attorneys for the application, many residents of the locality, and also the Greystone Association, the Pine Crest Residents' Association, the Hudson River Boat Club and the Orphan Asylum Society appeared personally and by counsel. Your committee was impressed with the fact that the entire locality on the hillside, back of the narrow strip of land owned by the applicant, is strictly high-class residential property, upon which there are no factories whatever, and that the view of the Hudson river is unobstructed by any factories for at least one mile.

A final hearing was held in Albany on July 12, 1916, at which time the attorneys for the applicant and several of the remonstrants appeared. It has been urged by the remonstrants that the deed under which the applicants claim title to the long strip of upland in question contained a covenant and restriction running with the land that the grantee and its assigns should not at any time thereafter erect, suffer or permit upon the lands thereby conveyed any noxious or offensive business whatever. There was also offered in evidence a map of Pinecrest-on-the-Hudson, showing that a part of the uplands of the applicant upon which it bases its claim for riparian rights is laid out as a private road fifty feet wide for a distance of about 650 feet, and as a ten-foot lane for a further distance of about 630 feet. This map shows thirteen lots which abut on the ten-foot lane, which evidently affords the only access to the lands. The remonstrants claim that when they purchased their lots the same were purchased and residences erected thereon upon the faith that the neighborhood would continue to be a high-class residential property and that no factories would be built thereon. It would appear to your committee that the several remonstrants have purchased land from the Pinecrest Association in this locality, relying upon representations made to them that the locality would remain exclusively a strictly residential property and that the riparian rights would be used for no other pur-

pose than yacht clubs, swimming clubs and other purposes for the pleasure of the community.

It is evident that the Land Board could not be concluded as to the disposition of lands under water by restrictions placed upon the adjoining upland. The Land Board is not always obliged to grant the applicants lands appplied for by them. It would appear to your committee that a grant to this applicant of the lands now applied for would be detrimental to the interests of many property owners who have purchased lands for residential purposes in good faith, relying upon the representations made to them by the grantors of the applicant above referred to, and we would recommend the denial of this application as in the proper exercise of your discretion.

E. E. WOODBURY,
Attorney-General.

JAMES L. WELLS,
State Treasurer.

FRANK M. WILLIAMS,
State Engineer and Surveyor.

STATE OF NEW YORK
OFFICE OF THE ATTORNEY-GENERAL
ALBANY, August 18, 1916.

In re Trespass upon Lots 84 and 107, Refugee Tract, Town of Altona, Clinton County, N. Y.

Commissioners of the Land Office, Albany, N. Y.:

Gentlemen.—Yours of February 27, 1915, to the Attorney-General, with power, together with communications from the Conservation Commission, Attorney B. F. Feinberg of Plattsburg, N. Y., and several others, relative to the alleged trespasses upon State land, disclose the fact that Mr. Feinberg owns property adjoining that of the State and discovered certain alleged trespasses upon said State land while investigating alleged trespasses

upon his property. Mr. Feinberg then duly communicated with the Conservation Commission concerning such trespasses. The Conservation Commission then caused an investigation of such trespasses to be made, but the report seems to have been mislaid and inquiry to the several agents and employees of the Commission has revealed no evidence concerning such trespasses.

Walter Murray of Chateaugay, N. Y., who made the investigation for the Conservation Commission, has failed to respond to the several inquiries made to him concerning the matter. Further, it appears from communications in connection therewith that the boundaries to the lot in question are not clearly defined, although a survey was made in 1787. (See Field Book, Vol. 14, Surveyor-General's Office.) There does not seem to be sufficient information at hand to justify any action by this department.

I would suggest instructions concerning an investigation by this department, action by the sheriff and district attorney of Clinton county as provided by sections 8 and 9 of the Public Lands Law, or an investigation by an agent of the Land Commissioners pursuant to section 17 of the Public Lands Law.

Yours respectfully,

E. E. WOODBURY,
Attorney-General.

By GLENN A. FRANK,
Assistant Deputy Attorney-General.

STATE OF NEW YORK
OFFICE OF THE ATTORNEY-GENERAL

ALBANY, August 18, 1916.

Before the Commissioners of the Land Office.

In the Matter of the Application of ANN AUGUSTA MITCHELL
for the Release of Certain Escheated Lands in the Village of
Hempstead, Nassau County, N. Y.

To the Commissioners of the Land Office:

Gentlemen.—The petition of the above-named applicant shows that she is over 75 years of age and is the widow of George

Mitchell, one of the last surviving members of the Shinnecock Indians, who died April 7, 1913, intestate, aged 91 years, a resident of the village of Hempstead, and the owner in fee of a lot of land in said village, lying on the east side of Franklin street, described in said petition, being twenty-five feet in front and rear and about 129 feet deep on the north side and about 137 feet deep on the south side, upon which is erected a shack now occupied by the petitioner; that the petitioner was married to said George Mitchell in 1857 in the village of Hempstead, and that said Mitchell on his death left no heirs-at-law or kindred of any kind.

The said George Mitchell was an itinerant watch and clock repairer, and the land above described was purchased with the savings of many years, saved by the petitioner and her husband, and is the only property her husband was possessed of at the time of his death. The petitioner is old and feeble and unable to obtain employment, but hopes to maintain herself during the remaining years of her life from the proceeds of the sale of said lands above described should the Land Board see fit to release the same to her.

The said premises are a part of premises purchased by George Mitchell in the year 1866, he having conveyed the rear part of his lot to one Ann Augusta Clowes in 1868. The said premises are said to be of the value of \$600.

The application appears to be in accordance with the provisions of the statutes and the rules and regulations of the Land Board. Should your honorable body see fit to grant the prayer of the petitioner, the release should be without consideration, in accordance with the provisions of the statute.

Respectfully submitted,

E. E. WOODBURY,
Attorney-General.

STATE OF NEW YORK
OFFICE OF THE ATTORNEY-GENERAL

ALBANY, August 18, 1916.

Before the Commissioners of the Land Office.

In the Matter of the Application of CAROLINE COFFEY to the
Commissioners of the Land Office for the Release of the State's

Interest in a Narrow Strip of Land on the North Side of West Twenty-fourth Street, East of Tenth Avenue, in the City of New York, Alleged to have Escheated to the State.

To the Commissioners of the Land Office:

Gentlemen.—The verified petition herein and other proofs show that the petitioner is 73 years of age and is the widow of Hugh Coffey, to whom she was married in December, 1863, in the city of New York; that her said husband, Hugh Coffey, was a native of Ireland and came to this country prior to 1850 and was soon afterward duly naturalized; that in March, 1865, he purchased from George Warner the premises known as 445 West Twenty-fourth street in the city of New York, where the petitioner has resided continuously for upwards of forty years until very recently.

In the deed to the petitioner's husband the said premises were described as being parts of lots Nos. 77 and 78 on map of estate of T. B. Clark, beginning at a point on the north side of Twenty-fourth street, 245 feet and 10 inches east of Tenth avenue; thence easterly 22 feet and 10 inches by 98 feet and 9 inches deep; that petitioner's husband continued to hold the title to said premises until 1873, when, becoming enfeebled in health, he expressed a desire to convey said premises to the petitioner, his wife, who had contributed to the purchase price thereof, and for that purpose employed attorneys, now deceased, to prepare deeds of said premises to convey title to her; that through inadvertence the starting point of said deeds was incorrectly stated at 255 feet and 10 inches instead of 245 feet and 10 inches, leaving a difference of ten feet; that petitioner's attention was only called to this error recently when she placed her premises in the market for sale, although she has been in full possession during all these years of the premises beginning 245 feet and 10 inches east of Tenth avenue.

She further shows that her husband did not own any interest in any other premises on 24th street, but that the deed to her inadvertently overlaps the lot of an adjoining owner on the east side who has good title thereto.

Hugh Coffey died in the city of New York May 3, 1881, intestate and without issue. He left, however, besides the petitioner, a brother, Robert Coffey, who came to this country from Ireland and was naturalized in 1855, and died November 3, 1875, intestate, a widower, leaving one daughter, Elizabeth, his only heir-at-law, who subsequently married one Rufus Lisk. Elizabeth Lisk, by deed dated September 5, 1912, quit-claimed all her interest in this ten-foot strip to the petitioner.

The petitioner's husband, Hugh Coffey, had also another remaining brother named Andrew Coffey, who always resided in Ireland, and was a non-resident alien. He died there in 1881, having never filed his intention to become an American citizen. He died intestate, leaving him surviving his widow, Martha, and five children, all of whom still reside in Ireland, with the exception of one son, Robert James Coffey, who emigrated to Canada, and all of said five children have been at all times non-resident aliens. Robert James Coffey died in Canada in December, 1912, leaving a widow and three infant children, all residing in Canada. The widow and all of the heirs-at-law of Andrew Coffey, excepting said Robert James Coffey, quit-claimed their interest in said premises to the petitioner by deed dated October 22, 1912.

The petitioner is advised by counsel (and I think correctly) that Elizabeth Lisk as the only child of Robert Coffey, deceased, legally inherited an undivided one-half interest in said ten-foot strip, but as Andrew Coffey, the other brother, is a non-resident alien, his children could not inherit from him, and upon the death of said Andrew Coffey said Andrew's undivided one-half interest in said ten-foot strip passed by escheat to the State.

The petitioner has paid all the taxes upon said premises and has kept the same in repair since 1874.

The present market value of the whole of the premises 445 West Twenty-fourth street is about \$13,000, and the undivided one-half interest in said ten-foot strip does not exceed the amount of \$2,120, subject to the petitioner's right of dower therein, which would be at the rate of \$624 per front foot. The petitioner says she has no property or income outside of said premises.

Technically there appears to have been an escheat to the State of an undivided one-half of the Westerly ten feet of the house

and lot No. 445 West Twenty-fourth street, but evidently it was the intention of the petitioner's husband to convey the said premises to her, and the error in the deed was evidently an error on the part of the scrivener only, and it is very questionable whether the State could dispossess the petitioner as to said ten feet under said technical escheat. The escheat, however, did not occur on the death of her husband, but by reason of the fact that her husband's brother Andrew was and remained a non-resident alien and died such.

Therefore, if your honorable body see fit to grant the prayer of the petition, I think \$1.00 consideration should be paid.

Respectfully submitted,

E. E. WOODBURY,
Attorney-General.

STATE OF NEW YORK
OFFICE OF THE ATTORNEY-GENERAL

ALBANY, August 22, 1916.

Before the Commissioners of the Land Office.

In the Matter of the Application of EMMA NEHLSEN under Chapter 419 of the Laws of 1916 for the Release of a Lot of Land in the Former Town of Newtown, Queens County, Alleged to Have Escheated to the State.

To the Commissioners of the Land Office:

Gentlemen.—On December 1, 1913, Emma Nehlsen applied to the Land Board for the release of a lot of land twenty-one feet front and 120 feet deep on which is erected a one-story frame house of four rooms said to be worth not to exceed \$1,200, which lands escheated to the State on the death of Dorothea Ehrmann on July 8, 1872, intestate and without heirs. The report of Honorable Thomas Carmody, Attorney-General, to the Land Board under date of January 30, 1914, states that said application alleged that Dorothea Ehrmann died in Newtown, Queens county, N. Y., on July 8, 1872, intestate, leaving no known heirs-at-law, and that she was at her death the owner in fee of said land in the said town by purchase from John A. Meehan and wife

under a deed dated May 20, 1868; that said decedent left a husband, who subsequently remarried and had a child, Joseph Ehrmann, by his second wife, and that the petitioner purchased the lot in question in 1909 from Joseph Ehrmann, the son and heir-at-law of Andreas Ehrmann, deceased, and that he had advised the attorney for the petitioner that in his opinion the Land Board had no power to release the lands in question, for the reason that the petition was not presented within forty years after such escheat, as provided under section 60 of the Public Lands Law, and that the petitioner's attorney, coinciding with this view, desired that the application should be considered as withdrawn, and at a meeting of the Land Board held February 24, 1914, said report was adopted and the application was ordered withdrawn. Since this time chapter 419 of the Laws of 1916 was passed authorizing the Commissioners of the Land Office to release to Emma Nehlsen all the right, title and interest of the people of the State of New York in and to said lot upon such terms and conditions as to them shall seem just and proper, whereupon a new application was filed by this petitioner on July 8, 1916, setting forth the same facts contained in the former petition. In addition to the facts set forth in the report of Attorney-General Carmody, it has been shown that Dorothea Ehrmann purchased the said property in 1868 with money which was furnished by her husband, Andreas Ehrmann, and after the purchase of said lot Andreas Ehrmann in the year 1870 erected the present dwelling house thereon, a photograph of which accompanies the present application.

It further appears that Andreas Ehrmann died on or about April 15, 1884, leaving his last will and testament, wherein he assumed to devise said premises to his second wife, Regina, who died intestate on June 30, 1907, leaving said Joseph Ehrmann her only heir-at-law, said Joseph being the only issue of the marriage of said Andreas Ehrmann and Regina, his second wife, and that on March 22, 1909, the petitioner Emma Nehlsen, believing said Joseph Ehrmann to be the owner in fee of said premises, purchased the same from him, paying \$1000 and receiving his deed, which was duly recorded in Queens county clerk's office.

She further shows in her petition that the actual possession of said premises since May 20, 1868, was in Dorothea Ehrmann

down to the date of her death in 1872, and from July 8, 1872, in Andreas Ehrmann down to the date of his death on April 15, 1884, and in Regina Ehrmann from April 15, 1884, down to the time of her death on June 30, 1907, and in Joseph Ehrmann from June 30, 1907, to the date of his conveyance to the petitioner March 22, 1909, and from that time has been in the petitioner, and during said period from 1868 up to the same time there has been no adverse claim in any person whatsoever.

In view of this adverse possession against the State for over forty years, and in view of the provision of section 362 of the Code of Civil Procedure, which provides that the people of the State will not sue a person for or with respect to real property or the issue or profits thereof by reason of the right or title of the people of the State to the same unless the cause of action accrued within forty years before the action is commenced or the people or those from whom they claim have received the rents and profits of the real estate or some part thereof within the same period, it would seem that the State would have difficulty to recover possession of said premises in an action of ejectment under section 1977 of the Code.

It appears that Mrs. Nehlsen desired to procure a loan on said premises, but was unable to procure the same because of the technical escheat of the State in 1872. This application is made in accordance with the statute and the rules and regulations of the Land Board, except that the rule of the Land Board requiring an advertisement of the notice of the present application to the Land Board has not been made. However, Mrs. Nehlsen, did advertise for the required period in the year 1913, at the time of her first application, and as she now in her petition asks that the Board waive the publication of the notice of application in order to save her this expense, I would recommend the waiver of the rule requiring publication.

I am of the opinion that the Land Board has full power to grant the prayer of the petitioner and release the lands described in the petition to the petitioner, without consideration.

Respectfully submitted,

E. E. WOODBURY.

Attorney-General
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STATE OF NEW YORK
OFFICE OF THE ATTORNEY-GENERAL

ALBANY, September 19, 1916.

Before the Standing Committee on the Hearing of Remonstances of the Commissioners of the Land Office.

In the Matter of the Application of FRANCIS K. PENDLETON and ISABELLE PILLSBURY BENEDICT, as Trustees under the Last Will and Testament of JAMES H. BENEDICT, Deceased, for an Extension of Three Years' Time Within Which to Comply with Conditions of Letters-Patent for Land under Water of Westchester Creek in the Bronx Borough of New York City.

To the Commissioners of the Land Office:

Gentlemen.—This is an application for a second extension of a water grant originally made in the year 1907 to James H. Benedict for 11.604 acres. Mr. Benedict died and a renewal patent was issued on June 26, 1912, for three years from February 10, 1913, to the above-named trustees under his will. They now apply for a second renewal. A protest was filed against this application by the corporation counsel of the city of New York. The city claims title to the lands under water applied for, alleging that the same was granted by a colonial patent to the town of Westchester, and now belongs to the city of New York. The matter was heard by your committee at the town clerk's office, Manhasset, N. Y., June 27, 1916. On June 8, 1916, the corporation counsel wrote the Attorney-General asking that his appearance be noted and that the argument made by Assistant Corporation Counsel E. J. Freedman on the hearing of the application of William Kroppf et al., representing the heirs of Augusta E. Hemmer, for a similar extension of time affecting adjoining premises, be considered as having been submitted on this application. The corporation counsel did not attend at the hearing at Manhasset. It appears, however, that the Pendleton trustees have commenced a suit against the city of New York to determine the question of title to the lands under water. Your committee would respectfully refer your honorable board to our report, dated April 26,

1916, in the Kroppf application, wherein we recommended that a renewal grant be made for three years over the objections of the city of New York, so that the validity of title could be tested in the courts. We stated that to refuse to make a renewal grant would be to create a forfeiture. It is our opinion that a similar disposition should be made of this case, and we recommend that the matter take the usual course of uncontested applications.

Respectfully submitted,

E. E. WOODBURY,

Attorney-General.

JAMES L. WELLS,

State Treasurer.

FRANK M. WILLIAMS,

State Engineer and Surveyor.

STATE OF NEW YORK

OFFICE OF THE ATTORNEY-GENERAL

ALBANY, September 20, 1916.

Before the Standing Committee on the Hearing of Remonstrances of the Commissioners of the Land Office.

In the Matter of the Application of THE CENTRAL HUDSON GAS AND ELECTRIC COMPANY for a Grant of Land under the Waters of the Hudson River, in the City of Poughkeepsie, Dutchess County, for Beneficial Enjoyment.

To the Commissioners of the Land Office:

Gentlemen.—This is an application for a grant of .518 of an acre of land under water in front of the uplands of the applicant

On April 17, 1907, a grant was made of .514 of an acre to the Poughkeepsie Light, Heat and Power Company, opposite the northerly part of the present applicant's lands. The Poughkeepsie Light, Heat and Power Company was since consolidated with another company, in the year 1911, and the entire premises are now

owned by the Central Hudson Gas and Electric Company. The grant applied for is opposite the southerly portion of their up-lands and extends out to a line in conformity with the exterior line of the former grant of 1907.

A remonstrance was filed against this application by the city of Poughkeepsie, principally upon the ground that one of the public sewers of the city runs along the lands of the applicants and empties into the Hudson river at an interior point of the lands under water applied for, the city having obtained an easement for such sewer by condemnation proceedings in the year 1874, and that the building of a dock in front of said sewer would deprive them of their easement rights.

Recently the applicant and the city of Poughkeepsie have entered into an agreement whereby the city withdraws its remonstrance to said application, and the applicant agrees that if the lands under water applied for be granted to it, it will not erect thereon any wharf, dock or other structure which will interfere with the operation or maintenance of the sewer, or that, when it should build a dock or structure upon said land under water, it will carry the discharge pipes, of iron or steel of proper thickness, etc., of the present sewer, to the edge of such dock or structure which it may erect, all at its own expense.

Your committee, therefore, upon the withdrawal of this remonstrance, recommend that this application take the usual course of uncontested applications.

Respectfully submitted,

E. E. WOODBURY

Attorney-General.

JAMES L. WELLS,

State Treasurer.

FRANK M. WILLIAMS,

State Engineer and Surveyor.

STATE OF NEW YORK
OFFICE OF THE ATTORNEY-GENERAL

ALBANY, November 22, 1916.

Before the Commissioners of the Land Office.

In the Matter of the Application of ROBERT STERLING CLARK for a Determination under Section 1627 of the Code of Civil Procedure, that the Interests of the State do not Warrant the Land Board in making an Order for the Payment of a Mortgage about to be Foreclosed.

To the Commissioners of the Land Office:

Gentlemen.— Robert Sterling Clark, the assignee of a mortgage upon certain lands in the Borough of The Bronx, New York city, given to secure the payment of \$92,400, by his verified statement shows that he is the present holder of said mortgage and desires to foreclose the same; that the mortgage was given by one Sadie Trask Sturges, on September 1, 1909, and that she died in New York county December 1, 1915, leaving a will which was duly probated, and leaving her sister, Adele Sturges Dodd, her only heir-at-law; that a transfer tax upon this estate has not yet been paid, and that the people of the State would be a party defendant to the foreclosure action for no other reason than the lien, if any, of said unpaid transfer tax, and he asks, pursuant to the amendment to section 1627 of the Code of Civil Procedure, by chapter 331 of the Laws of 1916, that the Commissioners of the Land Office determine that the interests of the State do not warrant their making an order for the payment or cancellation of said mortgage out of the State treasury.

I concur with the State Comptroller in recommending that your honorable body make such determination, in order that the plaintiff in said action may immediately proceed with his foreclosure suit without delaying his action for the period of three months, as provided for alternatively in said section.

Respectfully submitted,

E. E. WOODBURY,
Attorney-General.

STATE OF NEW YORK
OFFICE OF THE ATTORNEY-GENERAL

ALBANY, November 22, 1916.

Before the Commissioners of the Land Office.

In the Matter of the Application of WILLIAM BEADLEY & SON for a Confirmatory Grant of Lands under Water under the East River, at Ravenswood, Long Island City.

To the Commissioners of the Land Office:

Gentlemen.— This is an application by William Bradley & Son (a corporation), claiming to be the present owners of certain uplands at Ravenswood, Long Island City, Queens county, lying between Vernon avenue and the East river, and between Worth and Noble streets, and also successors in title to certain lands under water, which were granted to Samuel J. Beebe on November 7, 1857, for a confirmatory grant of the lands under water which were granted to said Beebe.

It appears that in the year 1853 said Beebe, who was the owner of a tract of upland lying immediately north of and adjoining the uplands in question, had a survey made of a tract under water containing 59/100 acre in front of his then uplands in contemplation of a water grant application which he later filed with the Land Board in the latter part of the year 1856. On November 15, 1856, while his application was pending before the board, it appears that Beebe purchased the uplands now in question from Jonathan Miller, referee, by two deeds, dated November 15, 1856, recorded in Queens County Clerk's office in Liber 147 of Deeds, at pages 258 and 260, and thereupon he published in a Queens county newspaper a new notice of application for lands under water in front of both tracts of upland, including the tract of 59/100 acre and also the land under water in front of the uplands which he purchased from Referee Miller. The description of the lands applied for in his second published notice was, however, erroneous in two respects, first, the third course was described as running N. 40° 30' E. 527.20 feet, when the exact length of that line was about 577 feet, and second, the area of

the entire tract was described as containing 89/100 acre, when it actually contained over 1.32 acres, and the letters patent issued to Beebe followed the incorrect description in both instances.

If this present application for a confirmatory grant were made simply to correct the manifest errors above alluded to and no jurisdictional questions were involved, I should have no hesitation in recommending the issuance of a confirmatory grant. But it appears that no proof was made to the Land Board of the posting of the notice of application of the lands under water in question by Beebe on the Queens county court house door as required by the provisions of the Public Lands Law.

It further appears that said Beebe by deed, dated September 9, 1857, conveyed all the uplands adjacent to the lands under water in question, to Anna Pickersgill, a predecessor in title of these applicants. This deed was made and delivered two days before the adoption of a resolution by the Land Board authorizing the grant to Beebe and over two months before the date said letters patent were actually issued. It therefore appears that Beebe was not the owner of the adjacent upland at the time of the grant.

The petition herein states that all the successors in title to said Beebe have held said uplands, including the lands under water, in the belief that said letters had been regularly granted and have filled in a portion of the lands so granted, and have erected a factory building and docks upon their uplands and also over a portion of said lands under water; that the applicant recently applied for a mortgage loan covering said premises and that its title was objected to upon the ground as before stated, that Beebe was not the owner of the adjacent upland at the time of the issuance to him of said letters patent.

Chapter 283 of the Laws of 1850, amending sections 66 and 67 of article IV of title V, chapter 9, part I, Revised Statutes of 1827, which was in force at the time of the issuance of said water grant, provided:

“§ 1. The commissioners of the land office shall have power to grant in perpetuity or otherwise, so much of the lands under the waters of navigable rivers or lakes, as they shall deem necessary to promote the commerce of this state, or proper for the purpose of beneficial enjoyment of the same

by the adjacent owner; but no such grant shall be made to any person other than the proprietor of the adjacent lands, and any such grant that shall be made to any other person shall be void.

§ 2. The powers conferred on the commissioners of the land office by the first section of this act, are hereby extended to lands under water, and between high and low water mark in and adjacent to and surrounding Long Island, and to all that part of the county of Westchester, lying on the East or Hudson river or Long Island sound; but no grant made under this act shall extend beyond any permanent exterior water line, established by law, and nothing contained in this act shall authorize the commissioners of the land office, to grant any lands under water belonging to the mayor, aldermen and commonalty of the city of New York, nor to interfere with any property, rights or franchises of said corporation of the city of New York, or interfere with the rights of the Hudson river railroad company."

There were, however, various other jurisdictional defects in the grant to Beebe, not referred to in the petition herein.

1. The applicant Beebe's map showed the existence in 1853 of a sea wall extending across the water front of his uplands, leaving a considerable body of land originally under the waters of the East river intervening between said sea wall and the original high-water line, and that there was also a basin behind said sea wall which apparently was used for mooring of boats. The grant applied for and made to Beebe was for land under water outside of said sea wall, which was the inner bound of his grant. Said Beebe at the time of his application was not the owner of uplands immediately adjoining the lands under water applied for and granted, which only affected lands outside of his sea wall. Attention might be called to the provisions of chapter 283, Laws 1850, above quoted, limiting jurisdiction of the Land Board to grants to the proprietor of the *adjacent lands*.

2. The grant to Beebe, as before stated, appears to have been made only on defective proof of publication of his notice of application in a Queens county paper. There was no proof of posting of said notice on the Queens county court house door.

3. The greater part of the lands applied for and granted to Beebe, as shown on his application map, was below low-water mark of the East river.

Without bringing into this discussion the question which has frequently been raised by the city of New York of the power of the Land Board under chapter 232, Laws 1835, and chapter 283, Laws 1850, to make grants of lands within the boundaries of the city of New York, it is nevertheless true that such part of the lands in question below low-water mark were situated in the city and county of New York, the eastern boundaries of which extended to low-water mark on the Long Island shore at this point. (See Montgomery Charter of 1730 to mayor, aldermen and commonalty of the city of New York, and also Colonial Law, 1732, chapter 584, also New York City Consolidation Act, chapter 410, L. 1882, secs. 1 and 2.) No attempt was made, or is now made, to show that Beebe ever published or posted his application notice in New York county or that any notice whatever was given to the New York city authorities.

Section 69 of the Public Lands Law (Rev. Stats., 1827), then in force, provided:

“ § 69. Every applicant for a grant of land under water, shall, previous to his application, give notice thereof, by advertisement, to be published for six weeks successively, in a newspaper printed in the county in which the land so intended to be applied for, shall be situated; and shall cause a copy of such advertisement to be put up on the door of the court house of such county, and if there be no court house in the county, then at such places as the commissioners shall direct.”

In 1887 one William J. Matheson, then the owner of the upland adjacent to the 59/100 acre parcel originally applied for by Beebe in 1856, applied to the Land Board for and received a new grant of that portion of lands under water granted Beebe in 1857, lying in front of his uplands, and the abstract of title accompanying his application, which was regularly published and posted in Queens county, showed Beebe's deed to Anna Pickersgill was made before the issuance of said patent to Beebe. In 1897 William J. Matheson & Co., then owners of the same uplands, applied to the

Land Board and received a second new grant of said lands under water so granted to William J. Matheson in 1887, and also a narrow strip in front thereof, upon proof of publication and posting of application notice in both New York and Queens counties.

By resolution of the Land Board, adopted September 11, 1857, the grant to Samuel J. Beebe and twelve other grants to his neighboring land owners, covering a strip of land under water of the East river nearly one mile in length, were made without consideration and without proof of advertisement of notice in New York county.

The State of New York has recently appropriated a part of the lands thus granted in 1857 to Beebe's neighbors for a canal terminal and a claim has been filed against the State in the Court of Claims which it is my duty to defend.

There would be no serious legal questions involved in this application had the same been properly made in accordance with the provisions of the statutes, but although in a letter to the Attorney-General by Henry M. Bellinger, Jr., Esq., attorney for the applicant, dated New York, August 10, 1916, he announced his intention of beginning publication of his notice of application for the grant now applied for in order to get in the six weeks' publication before September 28th, no proofs of publication or posting of said notice in either New York or Queens county have been filed, nor have the usual rules of the Commissioners of the Land Office governing water grant applications been complied with, and I am therefore compelled to transmit to you my opinion upon the facts as above stated.

OPINION

The Commissioners of the Land Office have power under section 11 of the Public Lands Law to make confirmatory grants to correct manifest errors in earlier grants, so that the grants shall read as originally intended under the resolution authorizing their issuance. Such power does not extend to the curing of *jurisdictional defects* in the original grant, or to state it differently, a grant which is absolutely void for lack of jurisdiction in the Land Board to make the same cannot be given life through a process of confirmation. Section 11 of the Public Lands Law reads:

"§ 11. Power to confirm defective grant. Whenever a sale is lawfully made, or directed to be made by such commissioners, including a sale of land under water, if, at the time of the adoption of the resolution to make the grant, the necessary jurisdictional facts existed to authorize the grant, and by reason of accidental omission or manifest error, the patent is not actually issued, or has been issued to the appellant deficient or manifestly erroneous in description or otherwise, such commissioners may, in their discretion, and on such terms as seem to them proper, cause to be issued to such applicant, or to persons deriving claim or title from him subsequently to the passage of such resolution, a release or confirmatory grant of such lands or any parts thereof, which release or confirmatory grant shall vest in the grantee therein named such right and estate, to the extent of the right or title of the State in such lands, or parts thereof, as is therein named."

A specific power, as above, to correct manifest errors in description or otherwise, does not extend to the correction of jurisdictional errors or omissions. (Matter of Hermance, 71 N. Y. 481.)

1. The first jurisdictional defect urged against the original grant of 1857 to Beebe is that Beebe was not the owner of the lands adjacent to the lands under water granted by the patent. Section 75 of the Public Lands Law (then chap. 283 of the Laws of 1850, § 1) provides that *no grant of land under water "shall be made to any person other than the proprietor of the adjacent lands, and any such grant made to any other person shall be void."* Beebe, as has been adverted to, parted with his title to the upland two days previous to the resolution (Sept. 11, 1857) of the Land Commissioners directing the grant, and, accordingly, it is insisted that Beebe, not then being the owner of the adjacent lands, the grant to him was void, notwithstanding the further fact appears that Beebe quit-claimed on November 21, 1857, to his grantee the lands under water so granted by the Land Board to him. At first observation it would seem that section 11 of the Public Lands Law could be construed broadly enough to authorize a confirmatory grant to correct this particular situation. That is, assuming all the jurisdictional facts as to publication of notice, etc., existed "to

authorize the grant" by the Land Commissioners, we may say the patent in Beebe's case was not "actually issued" because such patent as did issue was void, and therefore *no patent actually issued*. The trouble with the argument is, however, that only the applicant "or persons deriving claim or title from him subsequently to the passage of such resolution" (§ 11, Public Lands Law) can obtain a confirmatory grant. Therefore ownership at the time of the resolution of the Land Board appears to have been considered by the statute as a jurisdictional prerequisite to the issuance of any grant, rather than as a mere collateral circumstance which, if erroneously understood by the Land Board, could be corrected by confirmatory grant.

There are many reasons why the fact of ownership at the time of the passage of the resolution is a jurisdictional one. A person by publication advertises that he is applying to the Land Commissioners for a grant of land under water in front of his premises. His adjoining neighbors and all others interested are given notice, so that they may remonstrate against the grant if they so desire. They may not desire to protest against a grant to the particular applicant, but if the applicant were some other person or corporation they might desire to object on the ground that the use which such person or corporation desires to make of the lands was injurious to their and the public interests. Such objections might influence the Land Board in the exercise of their absolute discretion as to making or not making the grant. Again, the applicant might desire the grant, but his grantee (acquiring title previous to the resolution) not desirous of the grant and unwilling to expend money to obtain lands under water.

I conclude that the fact of ownership at the time of the resolution of the Land Board is a jurisdictional one. The grant to Beebe was void, and the power of confirmation or correction of such a grant has been denied by statute to the Land Board.

An opinion of this office addressed to your honorable board under date of November 18, 1909 (Land Board Minutes, 1909, pp. 209-17), dealing with the question of a confirmatory grant of lands under water to the Midland Terminal Railroad Company, is a clear exposition of the limited power of the Land Commissioners to confirm grants. The Land Board in that case by a con-

firmatory grant struck out a prohibitory clause which had been intentionally, and not by error, inserted in the original grant. The opinion held that such subsequent action by the board was not a confirmatory grant at all but was in substance a new grant, and was invalid because no notice of the same was published or posted.

2. Beebe's application described the land applied for as running along the sea wall, and so did the grant made by the Land Board. The title to the land under water behind the sea wall and up to high-water mark still remained in the State. Grants may be made to the "proprietor of the adjacent lands." Such proprietor is the "upland owner" (*Rumsey et al. v. N. Y. & N. E. R. R. Co.*, 114 N. Y. 423). Therefore the power of the Commissioners of the Land Office to make grants of lands under water "adjacent to and surrounding Long Island" to the "proprietor of the *adjacent lands*" (Chap. 283, Laws 1850), and "to the owners of lands *adjacent* to the lands under water specified in this section" (§ 75. Public Lands Law) is limited to grants of land under water adjacent to uplands or to lands under water already owned by the upland owner. In other words there can be no intervening land not granted, and a grant which disregards this principle is void. The principle is obviously based upon the conceived impossibility of using for commercial purposes *in connection with the upland* (through the erection of docks, piers, wharves, etc.), or for beneficial enjoyment in connection with the upland, any parcel of land out in a river or lake without making use of the land under water intervening between it and high-water mark, which intervening land would of necessity be covered by the structures. (*Rumsey v. N. Y. & N. E. R. R. Co.*, *supra*, at p. 428.) I will attend shortly to the question of adverse possession since 1857 of these intervening lands and of the lands described in the patent.

3. Turning to the question of publication of notice, there are two objections raised with respect to the original grant to Beebe, (A) that there is no proof of posting of the second notice (containing a description including lands additional to those first applied for and bringing in the particular lands in question) on the court house door of Queens county, and (B) that there was no publication or posting of notice in New York county in which the

exterior portion of the lands under water lay. To overcome the decision in *People v. Schermerhorn*, 19 Barb. 540, that the failure to publish in New York county under similar circumstances is fatal with respect to the grant of any land in New York county, Bradley & Sons urge that as it does not affirmatively appear (as it did appear in the Schermerhorn case) that no publication was made in New York county, we must presume that such publication was made. The presumption is just the opposite. "The law presumes that all officers intrusted with the custody of public files and records will perform their official duty by keeping the same safely in their offices, and if a paper is not found where, if in existence, it ought to be deposited or recorded, the presumption thereupon arises that no such document has ever been in existence, and until this presumption is rebutted it must stand as proof of such non-existence." (*Deshong v. State of New York*, 176 N. Y. 475.)

We will concede that if there appeared a formal recital in Beebe's grant or in the minutes of the Land Commissioners stating that all of the requirements of the statutes with respect to posting and publication had been complied with, it might be incompetent to go behind the recital, but all that we find in connection with the grant and the application papers is a certificate of the Attorney-General stating that he has examined the *within* application of S. J. Beebe for a grant of land under water and certifies that the same is made in accordance with the provisions of the statutes relating to and providing for the issuing of water grants, and also that it is made in accordance with the rules and regulations of the Commissioners of the Land Office. The *within* application does not contain any proof of publication in New York county or proof of posting in Queens county on the court house door of the second description under which the grant was made. I conclude that we are obliged to go behind the certificate of the Attorney-General since it relates only to what is contained in the application papers, and they do not show proof of posting and publication in New York county or posting in Queens. Publication and posting are jurisdictional requirements. The granting under consideration did not comply with the statute as respects the land in either county.

Throughout I have been obliged to give the statute a quite technical construction due to the rule that a power to convey away the State's lands must be always strictly construed. All equities, however, are in favor of the applicant. The owners relying on the grant of 1857 have greatly improved the property and have possessed and claimed title to it for almost sixty years. That is to say, they have been in adverse possession of the land filled in behind the sea wall for sixty years, but land in front of the sea wall has been, I am informed, covered by structures only since 1905 or 1906.

No right can be acquired by prescription in the *public works* of the State such as a right to take waters from the Erie canal (*Burbank v. Fay*, 65 N. Y. 57; *Waterloo Woolen Mfg. Co. v. Shanahan*, 128 N. Y. 345, 361). Nor does it seem that any title in *public navigable rivers* can be obtained against the State by prescription or adverse possession (*Fulton Light, Heat and Power Co. v. State*, 200 N. Y. 400). Judge Gray, writing the opinion in the Fulton case, maintained the view that a right to use the surplus waters of the Oswego river at a State dam could be acquired by prescription or adverse possession, but in this conclusion his colleagues did not join, Chief Judge Cullen and Judge Willard Bartlett taking the opposite view, and Judges Werner, Chase and Hiscock preferring not to express an opinion on the point, the decision on the point not being necessary for a determination of the case.

No case so far decided by the courts would, however, prevent a determination that title by adverse possession could be obtained against the State in public navigable waters if such adverse possession were founded on a grant (*written instrument*) from the State itself; but I feel that no determination of this character will be made because of two other considerations which will weigh heavily with the courts, namely, the protection of the State from the *ultra vires* acts (*void patent*) of its officers and the sovereign nature of the State's ownership in trust of the bed of navigable waters. Judge Gray, in the Fulton case, expressly announces that prescriptive rights cannot prevail against the State's right to improve navigation in the bed of a navigable river. So I believe that no commerce rights built on prescription and adverse possession

(such as Beebe's) will be held good against the State's right to improve navigation in the East river. The docks constructed on such lands under water, if they had existed and had been used for forty years might not be regarded as purprestures and could be continued against every right except the sovereign right of the State to improve navigation.

In conclusion Beebe and his grantees probably have good title to the land filled in for (sixty years) behind the sea wall against every right but that of the State to improve navigation, but they have no such title to the lands in front of the sea wall which have been adversely held and occupied by structures, I am informed, for not much over ten years.

This discussion of adverse possession is inserted only for enlightenment of the equities. It cannot, of course, have any bearing upon the question whether or not the Land Commissioners have power to make a confirmatory grant. That power is governed entirely by the statute, and the statute precludes, I believe, the commissioners from making a confirmatory grant for the reasons I have before outlined. William Bradley & Son should make a new application covering all the lands in question, including lands behind the sea wall, publishing and posting notice as for an original application and complying in all particulars with the requirements of the statute.

Dated, November 22, 1916.

EGBURT E. WOODBURY,
Attorney-General.

STATE OF NEW YORK
OFFICE OF THE ATTORNEY-GENERAL

ALBANY, December 20, 1916.

To the Commissioners of the Land Office:

Gentlemen.— Referring to a resolution by your honorable board authorizing a grant to the Crucible Steel Company of America of abandoned canal land in the city of Syracuse, upon payment within three months from the 27th day of July, 1916, the date of

said resolution, of \$11,401.34 on account of grant, and \$5.00 patent fee, and quit-claim letters patent to be issued to said company for the land described in this petition, consisting of 4.559 acres of land, would report that on October 26, 1916, I received from Messrs. Wilson, Cobb & Ryan, attorneys, Syracuse, N. Y., representing the Crucible Steel Company, a letter enclosing a certified check for \$11,401.34 payable to the State Treasurer on account of said grant, and also a certified check for \$5.00 patent fee, which checks were delivered to me in escrow pending the time when the question of the liability of the State for certain local assessments for pavements and sewers should be determined. I accepted these checks and still hold the same in escrow, and wrote the attorneys for the Crucible Steel Company that I would recommend to the Commissioners of the Land Office that an extension of time be granted within which payment of the consideration and patent fee should be made.

I would therefore recommend that you pass a resolution extending the time of payment by the Crucible Steel Company for three months from October 27, 1916.

Dated, December 20, 1916.

Respectfully submitted,

E. E. WOODBURY,
Attorney-General.

By MERTON E. LEWIS,
First Deputy.

STATE OF NEW YORK
OFFICE OF THE ATTORNEY-GENERAL

ALBANY, December 20, 1916.

Before the Standing Committee on the Hearing of Remonstrances of the Commissioners of the Land Office.

In the Matter of the Application of the CORBIN LAND COMPANY for a Grant of Land under the Waters of Arthur Kill on Staten Island Sound, in the Borough of Richmond, New York City, for Beneficial Enjoyment.

To the Commissioners of the Land Office:

Gentlemen.— This application was filed October 9, 1916, and was referred to your committee together with protests of the Crown Lands Corporation of Staten Island and the American Title and Trust Company of Wilmington, Delaware.

The remonstrants claimed title to the lands under water applied for by reason of a Colonial grant made to Lancaster Symes in 1708. The remonstrants were notified of a hearing which was held by your committee on November 28th last, but did not appear. Similar remonstrances against water grants on Staten Island have been filed by claimants under the Lancaster Symes grant, of remaining lands on Staten Island and have uniformly been overruled.

Your committee recommends that the remonstrances in this case be overruled and that the application take the usual course of uncontested applications, and should a grant be made to the applicant, a further condition should be therein inserted that the patentee by acceptance of said patent expressly waives any and all claim to interest on the purchase price of said land, in the event of the failure of title of the State to the lands thereby granted.

Respectfully submitted,

E. E. WOODBURY,

Attorney-General.

FRANK M. WILLIAMS,

State Engineer and Surveyor.

JAMES L. WELLS,

State Treasurer.

STATE OF NEW YORK

OFFICE OF THE ATTORNEY-GENERAL

ALBANY, December 21, 1916.

Before the Commissioners of the Land Office.

In the Matter of the Proposed Purchase of a Parcel of Land Belonging to the County of Albany on the South Side of New Scotland Avenue in the City of Albany, for the Division of

Laboratories and Research of the State Department of Health,
as Provided by Chapter 266 of the Laws of 1916.

To the Commissioners of the Land Office:

Gentlemen.—Chapter 266 of the Laws of 1916 authorizes the board of supervisors of Albany county to sell and convey to the State for such price and upon such terms as shall be determined by agreement with the Commissioners of the Land Office, a plot of land belonging to the county of Albany, adjoining the present Troop "B" Armory site, on the south side of New Scotland avenue in the city of Albany, having a frontage of about four hundred feet and an average depth of about five hundred twenty-five feet.

The board of supervisors of Albany county appointed a committee consisting of Charles E. Niver, President of the board of supervisors, and Hon. Ellis J. Staley, county attorney, to confer with the Standing Committee of the Land Board, to whom the matter was referred by your honorable board at a meeting held September 27, 1916.

Your committee submits the following report:

The committee of the board of supervisors was heard, as was also Dr. Linsley R. Williams, Deputy State Commissioner of Health, and Dr. Augustus B. Wadsworth, Director of the Division of Laboratories and Research of the State Board of Health.

The land proposed to be purchased was shown on a map prepared under the direction of the State Engineer and Surveyor on November 3, 1916, and comprises a parcel of land adjoining Troop "B" Armory, containing 4.998 acres, having a frontage of four hundred feet, a depth on the west side of seven hundred fifty feet and on the east side three hundred feet, running back diagonally five hundred and seven and six-tenths feet and fifty-seven and one-half feet in the rear, which parcel is subject to a right of way through the southeasterly side thereof as shown on said map, reserved to the city of Albany in its deed for said land and other premises to the county of Albany, dated July 19, 1912, for ingress and egress to and from the city's smallpox hospital, until Lexington avenue shall be opened, when the right shall cease.

Both parties agreed that the lands described on this map were proper and necessary for the purpose described in the act; and that the right of way reserved to the city of Albany would not interfere with the proposed use of said land by the Department of Health, whereupon your committee referred the matter to the Official Appraisers of the Land Board, who made an examination and appraisal of the lands described on said map. They reported a valuation of said lands of \$40,000, being the amount which the county is willing to accept in payment therefor.

We would therefore recommend that the report of the appraisers be accepted and that the agreement for the purchase of said lands from the county of Albany for \$40,000 be ratified by your honorable board, and that the Secretary of the Land Board be authorized to certify to a voucher to the State Comptroller for the purchase of said lands from the county of Albany for \$40,000 upon the approval of title by the Attorney-General and delivery of deed to the State.

Dated, December 21, 1916.

Respectfully submitted,

EGBURT E. WOODBURY,
Attorney-General.

FRANK M. WILLIAMS,
State Engineer and Surveyor.

JAMES L. WELLS,
State Treasurer.

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